NATIONAL SECURITY WHISTLEBLOWERS IN THE POST-SEPTEMBER 11TH ERA: LOST IN A LABYRINTH AND FACING SUBTLE RETALIATION

HEARING

BEFORE THE

SUBCOMMITTEE ON NATIONAL SECURITY, EMERGING THREATS, AND INTERNATIONAL RELATIONS

OF THE

COMMITTEE ON GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

FEBRUARY 14, 2006

Serial No. 109–150

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NATIONAL SECURITY WHISTLEBLOWERS IN THE POST-SEPTEMBER 11TH ERA: LOST IN A LABYRINTH AND FACING SUBTLE RETALIATION

TUESDAY, FEBRUARY 14, 2006

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON NATIONAL SECURITY, EMERGING THREATS, AND INTERNATIONAL RELATIONS,
COMMITTEE ON GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 1:05 p.m., in room 2154, Rayburn House Office Building, Hon. Christopher Shays (chairman of the subcommittee) presiding.

Present: Representatives Shays, Duncan, Dent, Weldon, Kucinich, Maloney, Van Hollen, Ruppersberger, and Waxman.

Staff present: Lawrence Halloran, staff director and counsel; J. Vincent Chase, chief investigator; Robert A. Briggs, clerk; Marc LaRoche, intern; Phil Barnett, minority staff director/chief counsel; Kristin Amerling, minority general counsel; Karen Lightfoot, minority communications director/senior policy advisor; David Rapallo, minority chief investigative counsel; Andrew Su, minority professional staff member; Earley Green, minority chief clerk; and Jean Gosa, minority assistant clerk.

Mr. SHAYS. A quorum being present, the hearing of the Subcommittee on National Security, Emerging Threats, and International Relations entitled, "National Security Whistleblowers in the Post-September 11th Era: Lost in a Labyrinth and Facing Subtle Retaliation," is called to order.

All Federal employees are ethically bound to expose violations of law, corruption, waste, and substantial danger to public health or safety. But meeting that obligation to "blow the whistle" on coworkers and superiors has never been easy. Breaking bureaucratic ranks to speak unpleasant and unwelcome truths takes courage and risks invoking the wrath of those with the power and motivation to shoot the messenger.

Seldom in our history has the need for the whistleblower's unfiltered voice been more urgent, particularly in the realms of national security and intelligence. Extraordinary powers needed to wage war on our enemies could, if unchecked, inflict collateral damage on the very rights and freedoms we fight to protect. The use of expansive executive authorities demands equally expansive scrutiny by Congress and the public. One absolutely essential source of information to sustain that oversight: whistleblowers.

On September 11, 2001, we learned the tragic price of relying on cold war paradigms and static analytical models that could not connect the dots. Since then, a great deal of time and money has been spent retooling the national security apparatus to meet new threats. Today, in the fight against stateless terrorism, we need intelligence and law enforcement programs to function strictly according to the law and with ruthless efficiency. And we need whistleblowers from inside those programs, national security whistleblowers, to tell us when things go wrong.

But those with whom we trust the Nation's secrets are too often treated like second-class citizens when it comes to asserting their rights to speak truth to power. Exempted from legal protections available to most other Federal employees, national security whistleblowers are afforded far less process than is due as they traverse separate and unequal investigative systems in the Department of Justice, the Department of Defense, the Department of Energy, Central Intelligence Agency, and other agencies.

They work in secretive communities institutionally and cultural hostile to sharing information with each other, much less those of us outside their closed world. In that environment, reprisals for whistleblowing can easily be disguised as personnel actions that allegedly would have taken place anyway for failure to be a team player. Whistleblowers in critical national security positions are vulnerable to unique forms of retaliation. Suspension or revocation of a security clearance can have the same chilling effect as demotion or firing, but clearance actions are virtually unreviewable under current whistleblower protections.

Last year, the Government Reform Committee approved a bill to strengthen whistleblower protections for most Federal employees. To help define the full scope of the problem faced by national security whistleblowers, the proposal also directed the Government Accountability Office [GAO], to study possible correlations between protected disclosures and security clearance revocations.

It is in that same cause we convened today, to better understand the plight of national security whistleblowers in this new and dangerous era. Should security clearance revocations be included in the list of personnel practices managers may not use against whistleblowers? What additional protections would draw out needed disclosures without infringing on the legitimate powers of the executive branch to keep secrets?

This is an open hearing because employee rights and management accountability must be discussed openly. There is nothing top secret about gross waste or the abuse of power. At the same time, witnesses with access to secured information have assured us their testimony will avoid even the inadvertent disclosure of classified materials, and we will, of course, take care to observe those boundaries.

We are joined today by a panel of whistleblowers who will describe their difficult journeys, a panel of experts on whistleblower protections, and a panel of those in Government to whom whistleblowers look for fairness and due process when their courage is met with resistance and reprisals.

[The prepared statement of Hon. Christopher Shays follows:]

Statement of Rep. Christopher Shays
February 14, 2006

All federal employees are ethically bound to expose violations of law, corruption, waste and substantial danger to public health or safety. But meeting that obligation to "blow the whistle" on co-workers and superiors has never been easy. Breaking bureaucratic ranks to speak unpleasant and unwelcome truths takes courage and risks invoking the wrath of those with the power and motive to shoot the messenger.

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But those with whom we trust the nation's secrets are too often treated like second class citizens when it comes to asserting their rights to speak truth to power. Exempted from legal protections available to most other federal employees, national security whistleblowers must traverse a confusing maze of inconsistent regulations and procedures that too often afford them far less process than is due.

They work in a secretive community institutionally and culturally hostile to sharing information with each other, much less with those of us outside their closed world. In that environment, reprisals for whistle blowing can easily be disguised as personnel actions that allegedly would have been taken anyway for failure to be a team player. And whistleblowers in critical national security positions are vulnerable to unique forms of retaliation. Suspension or revocation of a security clearance can have the same chilling effect as demotion or firing, but clearance actions are virtually unreviewable under current whistleblower protections.

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Welcome.

Mr. SHAYS. We welcome everyone today, and with that I would ask the ranking member of the full committee if he has a statement.

Mr. WAXMAN. Thank you very much, Mr. Chairman, not only for recognizing me but for holding today's hearing on national security whistleblowers. I thank you also for working with the Democrats to select today's witnesses.

We are going to begin with a panel of present and former Government officials. They have three things in common: first, they were all screened and approved by our Government to work on our Nation's most secretive counterterrorism, national security, and law enforcement programs; second, they all came forward to report what they viewed as critical abuses in these programs; and third, they all claim to have been retaliated against for trying to correct these abuses.

There is one simple overarching question for today's hearing: Do the existing laws of our Nation provide sufficient protection for national security whistleblowers? Or should Congress enhance safeguards for people who are trying to do the right thing and protect this Nation?

The Bush administration has taken a consistent approach to those who question it from within. It attacks them.

The White House attacked Joe Wilson, and his wife, CIA agent Valerie Wilson, because Mr. Wilson disclosed that the Bush administration relied on fabricated evidence in making its case for war.

Richard Foster is an actuary at the Department of Health and Human Services who tried to tell Congress the true cost of the Medicare drug benefits. He nearly lost his job as a result.

General Eric Shinseki was forced to resign as Army Chief of Staff when he correctly predicted that the United States would need several hundred thousand troops to occupy Iraq.

Bunny Greenhouse, the top contracting official at the Army Corps of Engineers, was removed after insisting on enforcing the rules against Halliburton's monopoly oil contract in Iraq.

On the other hand, those who support the politics of this administration get preferential treatment.

To this day, Karl Rove retains his security clearance in spite of evidence that he mishandled classified information regarding Valerie Wilson's position at the CIA.

The President has stated that Mr. Rove will keep his clearance until he is actually charged with a crime. But that is not the standard that was applied to today's witnesses. Because they criticized administration policies, their clearances were suspended without any criminal charges and without any allegation that they disclosed classified information.

This is a double standard, and it has dangerous consequences. When future abuses occur, those who could blow the whistle will see what happens and remain silent rather than risk this kind of attack.

This result is bad for our country. Silencing national security whistleblowers who are attempting to report valid claims of waste, fraud, and abuse places our Nation in greater danger, not less. This should not be a partisan issue.

Last fall, this committee considered a bill to expand whistleblower protections for Federal employees. As written, however, this bill excluded national security whistleblowers.

To address this gap, Congresswoman Maloney offered an amendment that would have expanded the bill to national security whistleblowers. At the time of the vote, many members voted against that amendment.

To be clear, they did not say they were opposed to the idea. They said they did not have enough information at that time to make an informed decision. So I give credit to Chairman Shays for calling today's hearing to understand what these national security whistleblowers face.

My hope is that following this hearing, we can work together on a bipartisan basis to introduce new legislation that will provide national security whistleblowers with basic protections. No one with a security clearance should have to fear that his or her clearance can be pulled in retaliation for truthfully reporting corruption or abuse.

The national security whistleblowers here today are not alone. Many others could have testified, but we simply could not accommodate all of them, and I have some of their written statements here.

One is from Michael Nowacki, a former staff sergeant in the U.S. Army who worked as a counterintelligence agent and interrogator in Iraq. He reported serious flaws in U.S. detainee practices, after which his security clearance was stripped.

I also have a statement from Daniel Hirsch and a group of several Foreign Service officers from the State Department who also had their security clearances revoked for reporting what they viewed as abuses.

I thank all of them for their written submission and ask that their statements be made part of the official hearing record. And I thank the witnesses who are here today for their courage in speaking out.

Mr. SHAYS. Without objection, your requests for submission to the record will happen, without objection.

Mr. WAXMAN. Thank you, Mr. Chairman.

[The prepared statement of Hon. Henry A. Waxman and the information referred to follow:]

Statement of Henry A. Waxman ,Ranking Minority Member
Committee on Government Reform
Before the Subcommittee on National Security, Emerging Threats and International Relations
Hearing on "National Security Whistleblowers in the post-9/11 Era: Lost in a Labyrinth and Facing Subtle Retaliation"

Feb. 14, 2006

Thank you, Mr. Chairman, for holding today's hearing on national security whistleblowers. And thank you also for working with the minority to select today's witnesses.

We begin with a panel of present and former military and government officials. They have three things in common:

First, they were all screened and approved by our government to work on our nation's most secretive counterterrorism, national security, and law enforcement programs;

Second, they all came forward to report what they viewed as critical abuses in these programs; and

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STATEMENT OF MICHAEL S. NOWACKI
FORMER STAFF SERGEANT, UNITED STATES ARMY

To all the members of the Congress of the United States of America, thank you for giving me the chance to make this statement before you.

I would like to first give you some background on myself. I joined the US Army in 1990 at age 17. From 1990 to 2006, I served a total of over 10 years in the US Army, going from the rank E-1 Private to E-6 Staff Sergeant. I served in Operation Desert Shield and Operation Desert Storm in Saudi Arabia and Iraq, then I served in Operation Enduring Freedom in Europe and the United States in 2001-2002, and finally I served in Operation Iraqi Freedom in Kuwait and Iraq in 2004-2005. I have received 29 various awards and decorations during my career. I served as an Infantry Soldier, a Sniper, a Counterintelligence Agent, and an Interrogator. Since 2000 I have worked as a Police Officer in the City of Chicago. I am currently assigned as an Instructor in counter-terrorism and anti-terrorism awareness for the Chicago Police Department. Right now I am finishing a Masters degree in English, and have started another Masters degree in Public Policy Administration. I am married and I have a two-year old son. I consider myself to be politically independent, but I have never missed a chance to vote.

From June 2004 to April 2005, I was transferred from the Illinois National Guard to active duty, and attached to the 2nd Brigade, 10th Mountain Division (2BCT10MTN). I deployed to Baghdad, Iraq with this unit, where I worked as a Counterintelligence Agent and Interrogator. In Iraq, the two primary activities I was involved in were the gathering of information from informants, and the interrogation of detainees. What I experienced was that the intelligence collection effort at our brigade's level was seriously flawed. Most of the informants that my colleagues and I had were unreliable. Most of them were giving false or incomplete information. There were several possible reasons for giving bad information, but the two most common were money and personal vendetta. Many of the informants viewed the giving of information as a way to make a living. Some of them "shopped around," or gave the same bogus information to several different units. Some of them falsely accused other Iraqis of being involved in the insurgency because they had personal vendettas with the people they were accusing. In one instance, the informant had purchased a vehicle from the person he informed on, and falsely accused him of insurgent activities in order to avoid making the payments for the vehicle. In another case, the informant was actually conspiring with the insurgents to falsely accuse Iraqi citizens who were either employed by the Iraqi government or who were sympathetic to the Iraqi government or the coalition forces. Approximately 50-70 innocent people were detained based on the statements of this informant. Many times, the vendettas between the accuser and the accused stemmed from religious differences Usually the accuser was a Shiite Muslim and the accused was a Sunni Muslim. The vast majority of all information from these informants was useless, and some was outright damaging.

I noticed that the battalion level intelligence officers (S-2s) were collecting the majority of these false reports. Most of the time, the battalions that collected these reports were conducting military operations, usually raids, to detain suspects based on these reports. These people were then detained and brought to the interrogation facility, where I worked as an interrogator. Before I interrogated these suspects I reviewed the witness statements and the physical evidence. I found that most of these cases were based on obviously contrived, vague, and sometimes ridiculous witness statements. For example, the informants would sometimes say that the suspect was a member of both Al Qaeda and the Mehdi Army, which from their ideological differences is extremely unlikely. The informants seemed to be telling the intelligence officers everything they wanted to hear. As for physical evidence, sometimes suspects would be detained for merely possessing scraps of wire, broken electrical items, or harmless military souvenirs. One person was detained for having an IED detonator, which, when I examined it, turned out to be a flashlight. One man was detained for having a bar of gold, which when I examined it actually was not gold, but lead. One man was detained for having an artillery shell, which when I examined it was not an artillery shell but the empty casing from an artillery howitzer, which was being used as a flower planter.

It seemed that the detaining units were trying to detain as many Iraqi males as they possibly could, simply because they thought that the fewer Iraqi males were on the street, the fewer potential insurgents they could encounter. The intent of the commanders seemed to be that of protecting their troops, but since every Iraqi was seen as an insurgent, or someone who was withholding knowledge of the insurgents, winning hearts and minds was impossible. And in my view, winning hearts and minds was the best way to protect the troops. I tried my best to convince my commanders that the best thing we could do to win hearts and minds was to treat out detainees with decency, and release the innocent ones as soon as possible, so they would go home and be able to speak somewhat kindly of us. Instead, our commanders did the opposite. They required me to prove the innocence of a detainee, in order to win his release. It is almost impossible to prove that someone *has not* done something.

I estimated that over 90% of our detainees were innocent of why they were detained, however, our commanders wanted only 40% to be released. The rest were transferred to Abu Ghraib Prison for further detention. When our brigade wanted to transfer a detainee to Abu Ghraib, they had to write what was called a DTR, or Detainee Transfer Request. Then the Task Force Baghdad commander would have to review the request and approve it. The interrogation reports that I wrote which recommended release of detainees who I determined to be unworthy of further detention or interrogation, were picked apart and re-written in order to make the case seem stronger when the DTR was submitted. I learned this from several of the soldiers who were assigned to actually write the DTRs for the commander.

While in Iraq I made several verbal appeals to my supervisors to stop these practices, which I felt were hurting us in the long run. I was always told that this policy was dictated from higher levels, and there was no use trying to fight it. When I left Iraq I wrote a SECRET memorandum to the brigade commander in which I outlined the ways in which the intelligence collection effort could be improved. When I returned to the US I brought these issues up to the commander of my National Guard unit, and he brought a US Army CID (Criminal Investigations Division) investigator to speak to me. The CID investigator listened to my stories and told me that unfortunately, even though these were bad policies, they were not criminal in nature, so he wouldn't be investigating them.

What did end up getting investigated, however, was me. In February 2005, before I left Iraq, the freelance journalist Zelie Pollon, who was embedded with my brigade, received permission from the brigade commander to visit the interrogation facility. She was taken on a tour of the facility, which included my office. This did not surprise me, because Ms. Pollon had previously been given access to other SECRET facilities, including out Tactical Operations Center (TOC) and our Deployed Intelligence Support Element (DISE) facility. She was escorted by the facility Sergeant of the Guard, who was in charge of the facility. She asked me about my job, and I told her about some of the issues which I have explained thus far in this statement. She requested to speak to a couple of detainees, at random. I allowed her to speak to two random detainees, all in the presence of the Sergeant of the Guard. My chain of command in Iraq knew that I had spoken to Ms. Pollon, but none of my commanders ever reprimanded me for it at that time. Ms. Pollon did not publish a story based on these interviews until October 28, 2005, well after 2BCT10MTN returned to the US. The story, entitled "Terrorism's Training Grounds" was published online at www.alternet.org. On November 16, 2005, Ms. Pollon published a story entitled "Know Thy Enemy" in the Santa Fe Reporter. Both stories were derived from her interview with me.

I returned from Iraq in April 2005, after spending a cumulative total of 23 1/2 months on active duty in Operation Enduring Freedom and Operation Iraqi Freedom. In May 2005, I was interviewed by the journalist Tori Marlan of the Chicago Reader, a local independent weekly paper, about my experiences in Iraq. At the time I was worried about the security of my family and myself, so I was given the pseudonym "Jake" in the story, which was published on September 29, 2005 in the Chicago Reader under the title "How I Learned to Hate the War." My reason for granting this interview, and the interview with Ms. Pollon, was to educate the readers on what I personally experienced in Iraq. I felt that things were going wrong with the way the war was being conducted, and I felt personally guilty at having been involved in it. Two colleagues of mine were killed by IED explosions, and I personally felt that their lives had been wasted because the war was turning out to be a failure. I never considered myself an anti-war activist, I was only trying to share my experiences with the public. My philosophy is to educate a person, and then let him or her decide what to believe.

I chose not to re-enlist in the Army, and my contract was due to expire on November 1, 2005. Nov. 1 came and went, and I learned that for some reason, my discharge from the Army was not coming through. I inquired about it at my Illinois National Guard unit, and they said it was an administrative problem. I was owed $1,250 for a re-enlistment bonus, which was supposed to paid on Nov. 1, and finally in December 2005 I called the Illinois National Guard office which handles bonuses, in order to see why I hadn't received my bonus money. They told me that I couldn't be paid the bonus because I had a negative personnel action pending against me, but they didn't know what it was. I called the personnel branch of the Illinois National Guard and they told me that the negative personnel action was in effect because my Top Secret security clearance was suspended. I asked why it was suspended and they said it was because I was under investigation since July 2005. They said they didn't know why I was being investigated. I notified my National Guard unit commander about this problem, and he stated in an email that he didn't know anything about my situation and he "couldn't help me." In my experience in the Army, it is almost unheard of that a Major actually states that he cannot help a Staff Sergeant. I called the CID investigator whom I had spoken to about my experiences in Iraq, and he told me that because my clearance was suspended, he couldn't tell me why I was being investigated. He said that it was probably Counterintelligence or the FBI who was investigating me, not CID, but he said he was aware of it when he interviewed me. He also said that, "it was pretty stupid" for me to have talked to "that reporter." Because I received no assistance from my National Guard unit in resolving this issue, I contacted Congressman Rahm Emanuel's office via e-mail. Congressman Emanuel's staff member called me the next morning, and interviewed me by phone. An official inquiry into the matter was initiated. I finally was discharged by the Army on Jan. 11, 2006, but I still have not received my bonus money, and my security clearance is still suspended. I was told by the administrative sergeant at my former National Guard unit that my bonus is still being withheld because of the negative personnel action on my record, although nobody will tell me what exactly that negative personnel action is for.

My assessment of this situation is that the Army is simply unhappy with the fact that I told the truth to a reporter regarding what I viewed as abuses and misconduct in our intelligence and detainee operations in Iraq. In Iraq, the Army gave me the job to investigate, interrogate, and find out the truth, now, the Army is trying to punish me for telling the truth.

Thank you for giving me the opportunity to tell my story.

--January 30, 2006

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Concerned Foreign Service Officers is a group of current and former Foreign Service employees of the U.S. Department of State who are concerned about recent abuses of the security clearance process in the Department of State. The group was created in July 2005 to investigate, document and expose apparent misuse of the security clearance process by the State Department's Bureau of Diplomatic Security (DS) to circumvent federal labor laws and established personnel practices. The group asserts that the State Department is increasingly misusing a poorly managed and poorly regulated security clearance process to circumvent personnel regulations, to bypass equal employment opportunity and other civil-rights laws and to punish dissenters and whistle blowers within the agency. Through review of security clearance cases, Concerned Foreign Service Officers has documented improper and coercive interview techniques, fraudulent statements in investigative reports, suppression or destruction of evidence, improper seizure of personal property, misapplication of security regulations and numerous other improprieties in DS security clearance cases. These acts of misfeasance and incompetence threaten the national security of the United States by reducing the reliability and integrity of State Department security operations, by reducing the effectiveness of the Foreign Service, by directly damaging ongoing programs and by inhibiting the expression of dissenting views within the Foreign Service.

Effective operations depend on effective personnel. The security clearance process is not a personnel process and is conducted separately from the personnel processes of the agency. However, because the security clearance process determines who can or cannot work in an agency, and to which positions they can be assigned, security clearance determinations have a greater effect on recruitment, operations, and individual careers than most official personnel actions. The State Department devotes significant efforts to recruitment, training and retention of employees. It uses expert professionals to seek out the best applicants, to promote diversity and a representative workforce, to devise effective training, and to assign existing personnel to the positions which most effectively use their skills and expertise to advance national interests and protect national security. The personnel process is carefully managed, reviewed and regulated by laws ensuring effective operations, objective practices and the protection of employee rights. Ironically, any stage of this multi-layered, multifaceted, carefully-managed and reasoned process can be undone by a single security agent, with little oversight, virtually no due process, and complete exemption from nearly every law and regulation governing personnel practices. In addition to potential abuse of the clearance system to punish dissenters and whistle-blowers, Concerned Foreign Service Officers has identified cases involving ethnic, religious and other biases, use of clearance suspension to avoid due process in disciplinary cases, and serious improprieties in the investigative and adjudication processes. These actions, increasingly conducted by newly-hired and minimally-trained security agents, directly impact ongoing activities in every area of State Department operations and are conducted without regard to their impact on operations, resource management, national security and foreign-relations activities.

Concerned Foreign Service Officers joins the National Security Whistle Blowers Coalition and others in calling for greater oversight, rationalization and regulation of this process, including the creation of an independent review process for cases involving national security whistle blowers or national security operations.

CONCERNED FOREIGN SERVICE OFFICERS
P.O. BOX 7131
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February 3, 2006

Congressman Christopher Shays, Chairman
House Committee on Government Reform
Subcommittee on National Security,
Emerging Threats & International Relations
B-372 Rayburn House Office Building
Washington, DC 20515

Congressman Shays, members of the Subcommittee,

I am writing to you today on behalf of Concerned Foreign Service Officers, a group of Foreign Service employees of the U.S. Department of State. We thank you for this opportunity to testify about an issue that is vitally important to the security of our nation and to the correct functioning of the agencies charged with protecting the American people and conducting our foreign relations. These processes rely on information and our ability to process and understand that information. In order for them to work properly, there must be room for dissent, for an opposing interpretation, and occasionally, for the process to act quickly on a lone cry of alarm when a discovery has been made that affects us all. When the process works as it should, those who offer an honest assessment, a dissenting viewpoint, or an urgent warning, are called "good employees." When the process fails, these people are called "whistle blowers."

National Security Whistle Blowers are true American heroes and patriots, who place loyalty to the American people, and to our constitution, ahead of loyalty to a single agency, bureaucracy, employer or political party. Their efforts have exposed vulnerabilities to terrorism, sabotage, espionage and crime, as well as threats to the constitutional freedoms and civil rights which define the very core of our nation. Sometimes, these voices are listened to. Threats are avoided. Problems are corrected. Lives are saved. At other times, they are not. Bureaucratic inertia, political expediency, the short term requirements of a few, or even the personal career aspirations of a single well-placed individual may be given priority over national security and government efficiency. There are cases in which it is considered easier for a bureaucracy to silence a single voice than it is to address and correct systemic problems, and in these cases, whistle blowers speak out to their personal detriment, as the bureaucracies affected by their allegations seek to discredit, humiliate, isolate and punish them.

One of the primary instruments used to silence, punish and discredit whistle blowers has been the abuse of opaque and compartmentalized security clearance programs, such as that of the U.S. Department of State. Decisions under these programs have the same effect as personnel actions, yet they are not regulated by the rules prohibiting certain personnel practices. Without adequate oversight and legislated restrictions, these programs are easily abused to sidestep fair labor practices, civil rights laws, and other

restrictions, including those of the Whistleblower Protection Act of 1989, designed to ensure objective and efficient functioning of government. Because this largely non-accountable process decides who can work in an agency and who cannot, who can access information and who cannot, no other process in government operations offers such far-reaching opportunity for hidden abuse. The opacity and autonomy of the security clearance process easily enables the efficiency of our government agencies and the safety of our nation to be subordinated to the desires, careers and political aspirations of a few key employees, or, in some cases, to the ignorance, bias, or even simple incompetence, of a single unfortunately-placed adjudicator. Concerned Foreign Service Officers remains extremely concerned that such poorly managed and barely overseen security clearance programs are being used to silence not only whistle blowers, but also dissenters and others whose alternate viewpoints are vital to a balanced understanding of the threats and conditions affecting our nation. There is a strong link between the enactment and enforcement of strong protections for security whistle blowers, the proper functioning of our national security and foreign affairs agencies, and the enforcement of fair and proper functioning of the security clearance process.

Mr Chairman and members of the subcommittee:

In our testimony today, Concerned Foreign Service Officers will present the cases of three whistle blowers at the U.S. Department of State. We will discuss the ways in which a poorly supervised security clearance system has been abused to punish them, and misapplied to over forty recent cases at the Department of State. And we will discuss how this affects the American people, in terms of national security, government credibility, and waste of financial and other resources. Our topic is the protection of national security whistle blowers, and others testifying in this hearing will provide considerable detail concerning individual whistle blower cases. Concerned Foreign Service Officers will not dwell on the details of individual cases, and in any event, security restrictions would prevent us from providing certain details within this forum. Rather, our testimony, based on our experience with a large number of cases, will call your attention to some of the most common mechanisms used to silence, punish and discredit whistle blowers. Using examples from the U.S. Department of State, we will discuss in detail the ways in which the security clearance process can be abused to inhibit dissent and to force good employees to choose between whistle blowing and silence. Our examples are from the State Department, but similar techniques appear to have been used in many of the cases you will hear about today.

The first case we would like to mention concerns a consular officer at a large American Embassy in a strategic Middle-Eastern country, which, due to the closure at that time of our embassy in Baghdad, was the designated post to process Iraqi visa applicants. At the time his case began, the officer was the American Consul, heading the Embassy consular section, responsible for the full range of American Citizen's Services, refugee matters, immigrant and non-immigrant visa services. He supervised three junior officers who adjudicated some three hundred American visa applications per day, including a large number of Iraqi applicants. The State Department had issued post-9/11 guidance on dealing with Iraqi visa applicants, but the guidance was not being followed by all officers. The officer in question was a man of some 20 years of consular experience. The

junior officers he supervised were all new to the service. Rather than risk errors and lapses, therefore, this senior level consular officer instructed his junior level subordinates to direct Iraqi visa applicants only to him or to the NIV section chief. To most people, referring the toughest cases to the officers with the most experience would make simple common sense. The system worked well until another employee in the section fell under suspicion of visa fraud. Investigators in that case questioned the why the senior-most officer was personally addressing so many Iraqi cases. The officer defended his practice, considering that the national security concerns of these cases merited such special handling. The correct thing would have been for the Ambassador to support his Consul. The easy thing would have been to relieve him of his duties. Ease, in this case, won over common sense. The consular officer was recalled from post and his security clearance temporarily suspended. In order to justify the suspension, the Department of State's Bureau of Diplomatic Security (DS) accused him of visa fraud, unauthorized travel to a critical threat country and, ironically, endangering national security by manipulating the visa applications of Iraqi visa applicants. There followed a two-and-a-half year investigation, during which DS could not confirm any of their own allegations. An audit of his finances found no suspect transactions or unexplained income sources. Review of every case involving Iraqi visa applicants during his posting showed that applicants had properly applied at the embassy and that required name checks were properly performed before visas were issued. The Consular section also received praise from USG agencies concerning the quality of reporting on Iraqi applicants. Unable to confirm any of their original charges, DS expanded its investigation to include a completely unrelated isolated domestic matter, that was reported by the employee more than a decade ago, and a hearsay allegation concerning a job applicant, that could not, even at that time, be confirmed. Most recently, DS proposed a security clearance suspension based primarily on the fact that DS agents with no consular experience of their own, simply disagreed with the manner in which the officer adjudicated cases.

The second case concerns a DS Special Agent serving at an overseas critical threat post. The agent was accused of having an improper relationship with a local national and disregarding a "directive" to cease all contact with the local national. The agent countered that the relationship was platonic and proper. Other DS personnel serving at the post and in Washington had been informed about the relationship. The agent had even informed his wife about it. Furthermore, the agent had filed contact reports required by Department regulations. The matter was investigated and the investigation failed to establish evidence of any improper relationship nor substantiate any counterintelligence concerns. In the process, however, the agent (under investigation) identified several systemic improprieties in the DS investigative process. He reported these improprieties to DS management and, when his statements were ignored, he made them public. In retaliation, DS, having already suspended his security clearance, now moved to revoke it based on the assertion that he had violated a verbal order to cease and desist all contact with the local national. DS, however, was unable to produce any evidence of a verbal directive. The agent, in fact, has offered to sign a formal written cease and desist order. DS has ignored this offer. In the meantime, the agent's security clearance has remained suspended for almost three years. In his case, no additional charges were created. His case has simply been repeatedly prolonged by transferring it between investigating

agents. He has been questioned nine times by DS in virtually identical interviews, and the local national involved, who remains an employee in good standing of an American consulate, has been harassed by DS agents during interview sessions to the point where she filed a sexual harassment complaint with the Department alleging that she has repeatedly been subjected to vulgar and improper questions and comments. The officer, a highly-trained special agent with considerable overseas experience, is currently assigned to oversee the DS parking and cell phone programs in Washington DC.

The third case we raise involves a high level officer at a Central Asian post. In 1998 the officer had been involved in efforts to address long-standing problems in the State Department's Office of the Inspector General (OIG) and, in July, 1998, published an article on that subject in a professional publication. Importantly, those actions led to improvement in the State Department OIG, but they also left the employee marked as a whistle blower. In February 2003, the officer's wife asked a regional State Department psychiatrist for assistance in obtaining marital counseling. The employee was called back to Washington for interviews, at the end of which, his security clearance was suspended for "continued improper behavior" – an obvious reference to his earlier activities. He was briefly investigated concerning false allegations of spouse abuse. When these quickly proved groundless, DS began what has now become a three-year fishing expedition looking for any evidence whatsoever of malfeasance. To date, DS has not formally accused him of anything, and the search presumably continues. In the meantime, the employee has had no security clearance for three years and performs clerical and advisory duties at a level far below those a person of his rank and experience would normally perform.

These acts of retaliation have had clear and direct results, for the employees, for the agency, and for the American people. In all three cases we have mentioned, the employees and their families were suddenly recalled from overseas assignments, at a cost of tens of thousands of dollars each to the agency, and many thousands to the employee. One employee was literally forced to sell his family home as a direct result of the costs of his sudden and unanticipated transfer. All of the employees involved have been forced to incur legal costs, their careers have been irreparably damaged, and their lives have been forever changed. That is the minimum cost to the individual of doing the right thing, and that is the message that these DS actions convey to others who might consider speaking out to correct problems in the agency. In terms of national security, the sudden withdrawal of these three from their assignments meant that, in the one case, a visa section with a high potential for abuse by terrorists was left, for a while, in the hands of inexperienced first tour officers. In another, as a direct result of the employee's withdrawal, acquisition of a setback property to protect an American embassy from car-bomb attacks was delayed by over six months. A known vulnerability to terrorist attack was allowed to continue vulnerable. And in all of these cases, experienced officers serving at vital missions were sidelined, at a time when the Agency was already desperate to staff posts in these very strategic regions.

These actions have financial costs to the agency as well, many of which are hidden from the taxpayer. The cost of transferring an employee and his or her family back to the US

from overseas can be easily calculated, but the millions of dollars spent annually on the salaries of dozens of sidelined State Department employees is hidden. The average case takes two and a half years to resolve, and many cases at the State Department have been pending for three years or more. Why do these cases take so long? Ironically, one reason may directly involve the taxpayer's money. There is reason to believe that one reason these cases remain unresolved is that they are deliberately extended, since keeping them open facilitates larger budget and resource requests by the Bureau of Diplomatic Security (DS). Cases that are resolved against the employee or those that remain open are used to justify the need for greater resources. Cases that are resolved in favor of the employee are not. Obviously, a case that remains open for three years can be used as a statistic in three successive budget requests, whereas if the case were resolved in favor of the employee, it's statistical value would be "lost." The taxpayer pays the price, an employee's career is kept in limbo, and the Bureau of Diplomatic Security is rewarded for keeping cases open indefinitely. This is something that Congress may wish to investigate in another forum.

Returning to the process itself, the security clearance process is an administrative process rather than a judicial one. Judicial investigations are restricted by law in terms of what investigators can and cannot do. Administrative investigations are far less regulated. On the other hand, whereas compliance with judicial investigations is voluntary, compliance with an administrative investigation is mandatory. A whistle blower is forced to comply with the process and can be fired for cause should he or she fail to comply. In security clearance investigations, the Department of State Bureau of Diplomatic Security (DS) routinely abuses the differences in these two types of investigations, switching back and forth between administrative and judicial inquiries, in order to allow DS investigators to perform acts which no police officer or FBI agent in the United States would be allowed to perform. Concerned Foreign Service Officers has identified numerous fraudulent statements in DS Reports of Investigation, including several cases where alleged derogatory testimony was simply cut and pasted between alleged witness statements, so that several witnesses are alleged to have made identical derogatory statements, right down to the typographical errors in the transliterations of those statements. We have noted coercive interview techniques, including intimidation, false statements by investigators during interviews, spurious threats to deport naturalized spouses, failure to record positive information or exculpatory statements during interviews or in Reports of Investigations, and written distortion of regulations in Reports of Investigation and other communications. In many cases, exculpatory evidence presented to investigators in the presence of attorneys has not been recorded in reports of investigation. In at least one case, numerous references to a piece of evidence appearing in investigative documents were expunged from a final document, once it was demonstrated that those references were exculpatory. DS agents have also opened and searched sealed containers of personal effects and confiscated items of personal property without a warrant to do so. None of these acts would be allowed in a judicial investigation, and a case referred for criminal prosecution based on such "investigative" acts would be thrown out of any court in America. If whistle blowers were drug dealers, pimps, mass murderers or child molesters, they would enjoy protection from this type of "investigative" abuse. Because they are loyal government employees, hoping to remain in the employ of the agencies they serve, they must endure it. We strongly feel that any whistle blower protection act

must force the government to accord the same civil rights to employees under investigation as the government accords to criminals. Standards of investigative conduct must be published and adhered to, and failure to comply with federal investigative standards should be punished.

Moreover, the security clearance process as practiced at the U.S. Department of State is an allegation-based process rather than an evidentiary process. Virtually the entire investigative process consists of interviewing selected individuals. In most cases, little or no effort is expended to verify empirically the allegations or opinions expressed by the interviewed persons and clearance decisions are frequently based entirely on unsubstantiated allegations. While Federal standards of evidence exist, no standards of evidence are currently applied to DS suspension or revocation decisions. Concerned Foreign Service Officers has identified a number of cases where decisions or assertions were based on statements which could be immediately disproved by public records or by information readily available to the general public from other agencies or through public institutional data sources. In one case, for example, an employee's divorce (a matter of public record) was simply ignored in DS assertions that the employee's "extramarital" affairs made him vulnerable to blackmail. In another ongoing case, DS has ignored published and easily verifiable matters of public law to speculate on an employee's citizenship. In another, DS questioned whether an employee had obtained a university degree, a matter verifiable in minutes through the web site of the university in question. At the best of times, the process is capricious, subjective and subject to error. At worst, when there is a deliberate intent to abuse the system, the lack of evidentiary standards makes it difficult to identify cases of abuse, since many other cases are equally badly documented. We strongly feel that any bill to protect whistle blowers must take this into account. In order to prevent abuse of the clearance process to silence or discredit whistle blowers, a security whistle blower protection bill must require the government to adhere to standards of evidence before suspending or revoking a whistle blower's clearance.

Mr. Chairman:

In the course of our State Department careers, members of Concerned Foreign Service Officers have been shot at. We have had knives drawn on us. We have had guns drawn on us. One member of our group survived the bombing of the American Embassy in Nairobi. Another was shown a detailed drawing of the apartment in which he lived with his wife and children, provided by an Usama Bin Laden operative who confirmed that, before his arrest, he had been casing that Foreign Service Officer's apartment for possible attack by the Bin Laden organization. Many members of our group have volunteered for hazardous duties, willingly placing themselves in harm's way in the service of our country. Many of us have been personally responsible for the safety and security of the embassies to which we were assigned. Foreign Service Officers have been aware of the terrorist threat for many years, because far more frequently than most Americans, we are the specific targets of such attacks. We understand the need for security, and we understand the need for secrecy as a component of that security. We ask that you keep that point in mind as we continue, however, to note that the abuse of secrecy is another tool frequently misused to punish and silence those who place loyalty to America ahead

of loyalty to an organization. All of us are familiar with recent cases where the U.S. Government has refused to allow whistle blowers' cases to proceed through the courts, basing that refusal on the need to protect government secrets. The claim that legitimate secrets would be compromised in court cases may be true, or it may not be. Concerned Foreign Service Officers is not in a position to judge that, and neither is the American public. Unfortunately, no reliable independent body exists to answer that question.

We do know, however, that in addition to the possible abuse of secrecy in court cases, secrecy is certainly a key element in facilitating the misuse of the security clearance process to punish or inhibit whistle blowers. One of the key elements of the system as practiced at the Department of State is compartmentalization. This is a basic principle of security, which limits the sharing of information to those who have a need to know it. It is a standard practice, but one that is easily abused, because the originator of the information decides who has the need to know it. There is no guarantee that the originator of the information knows who might need it, nor is there any procedure to ensure that everyone who needs the information has access to it. Even in the best scenarios, therefore, there is the potential that information that should legitimately be shared is not shared with everyone who needs it. For example, we suspect that abuse of compartmentalization is a factor in the repeated failure of State Department clearance adjudicators to meet the mandatory requirement for "whole person" analysis in adjudication. Federal standards require an adjudicator to consider the "whole person" in a clearance decision, to consider his or her background, experience, work and other history, and all positive information available in addition to all negative information. In the case where an agency wants to abuse the process to punish an employee, it is easy to abuse compartmentalization to ensure that some of this information never gets considered.

Additionally, by its very nature, compartmentalization impedes oversight, makes the process less than transparent, and promotes lack of accountability. Although State Department regulations mandate that others outside DS play a role in clearance appeals and suitability decisions, none of these players is allowed to see the whole case, as DS claims they have no need to know all they need to know to make their decisions. In this scenario, secrecy is abused within the Department of State itself, to enable DS to hide information from other elements within the Department of State, to control the appeal and suitability processes, and to eliminate accountability for abuse of the security clearance process. This is one reason why we strongly feel that a whistle blower protection bill should require Federal agencies to subject security clearance suspension or revocation decisions to a properly cleared impartial body for outside review and appeal.

Concerned Foreign Service Officers has noticed a pattern of withholding of key information from the employee whose clearance is under review. Federal standards require that the employee must be notified of the reason or reasons for an unfavorable clearance decision, given an opportunity to respond, and notified of any rights to appeal before the case is adjudicated. In 1992, GAO report number GAO/NSIAD-92-99 (B-247246) commended the State Department for the degree to which it provided accused employees with access to the investigative findings regarding their clearances. Within the

past four years, however, the State Department has suddenly become more secretive, and has lurched to the opposite extreme. In many recent cases large portions of the investigative files are now routinely classified, and partly hidden from the employee as a result. We believe that these classifications are often improperly performed to protect DS interests rather than national security information. In a number of cases, we have also seen DS withhold some portion of the file in order to be able to present a completely new allegation only in the final phase of appeal of a clearance revocation case, without giving the employee any reasonable opportunity to respond to it. The allegation will have originated during the original investigation, but will have been withheld from the employee as a hidden "trump card" until the end of the process. It will suddenly surface, for the first time, in the "Executive Summary" and other documentation provided to the Security Advisory Panel, the final board of appeal for a security revocation recommendation, or even during the appeal hearing itself. This improper practice continues despite several critical challenges by the Foreign Service Grievance Board and other outside arbitrators.

This is all the more disturbing because, in the State Department, the revocation and appeal bodies are part of the same administrative hierarchy. In 1992, GAO report number GAO/NSIAD-92-99 (B-247246) observed that the State Department's Security Advisory Panel did not "give a clear perception of being administratively independent because the panel is composed of officials or employees within, or in close relationship administratively to, the offices that recommended revocation of clearances." Two of the three panel members work directly for and are evaluated by the third. The GAO recommended that the Department of State should add an intermediate body of non-agency examiners to ensure the independence of the State Department's appeal panel. We could not agree more. In the fourteen years since that recommendation was written, the composition and apparent lack of independence of the SAP has repeatedly been criticized, by the Foreign Service Grievance Board, by the American Foreign Service Association, and by others. We strongly feel that the use of an independent body to review security clearance revocations of alleged whistle blowers should be an essential component of any whistle blower protection act.

Secrecy and lack of accountability can lead to abuse. So can inattention to procedures. According to State Department OIG report number ISP-I-05-45 of December 2004, "significant deficiencies in investigative quality remain to be addressed" in DS security clearance cases. "Only 31 percent of reviewed files met all [general federal] investigative standards appropriate to the class of investigation," and "the final decision to grant a clearance was not reviewed by a supervisor in 43 percent of cases." That is not only a factor which enables the system to be easily abused to silence whistle blowers, it is also in and of itself a threat to national security, as, with 69 percent of files incomplete, and 43 percent of adjudications un-reviewed, truly bad cases can easily go unnoticed.

Before concluding, we would like to mention one additional matter. Until this point, we have spoken only about the process as it involves the Bureau of Diplomatic Security, but we should note that other offices in the State Department have also been involved in activities which can easily be abused to punish whistle blowers. A number of other

witnesses in this hearing will describe situations in which whistle blowers at NSA and elsewhere are falsely accused of mental illness or other medical conditions which are not substantiated by any objective medical evaluation. This has been well covered in the media, as well. There are numerous cases in the Department of State in which DS referrals under E.O. 10450 to the Department of State's Medical Office, M/MED, have resulted in derogatory medical reports based solely on information provided by DS. M/MED doctors have diagnosed mental illness, substance abuse and other alleged problems without any doctor ever having met the employee concerned or even reviewing a medical file. In most of these cases, M/MED "acknowledges" suitability concerns based solely on DS reports or statements. This has the effect of apparently providing a second, theoretically independent, opinion which acts as an additional obstacle to the employee's continued employment, without any medical tests or objective analysis having been performed. Noting that the United States government and the United Nations have repeatedly condemned such actions, when performed by other governments, as violations of basic human rights and even as a form of torture, Concerned Foreign Service Officers suggests that any whistle blower protection bill should address this issue as well. Medical findings related to suitability for employment or for a security clearance should be based solely on objective medical examinations. We have also noted apparent violations of the HIPAA act, involving improper sharing of medically privileged information as well as the creation of files, containing medically privileged information, which are not easily retrievable for release under the HIPAA and Privacy Acts.

Mr. Chairman and members of the subcommittee,

The Whistleblower Protection Act of 1989 sought to strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government, by mandating that employees who expose wrongdoing should not suffer adverse consequences as a result of prohibited personnel practices. Concerned Foreign Service Officers asks you to carry that protection further. We ask you to recognize that, in attacking security whistle blowers, Federal agencies are sidestepping their personnel systems altogether, and abusing a system unique to the Government, which is far less regulated, far more damaging, and often completely hidden from sight. We urge you to recognize and correct the ways in which security clearance procedures are currently being abused to bypass EEO regulations, Civil Rights laws, due process and the Whistleblower Protection Act, and to mandate protections which would protect Federal employees from these abuses as well.

We thank you again for the opportunity, and the privilege, to bring these matters to your attention.

For Concerned Foreign Service Officers,

(signed)
Daniel M. Hirsch

Mr. SHAYS. The Chair would now recognize the ranking member of the subcommittee, Mr. Kucinich.

Mr. KUCINICH. I want to thank the Chair for calling this hearing and thank our ranking member for the views that he just expressed.

I think all over America people are asking, when they see what is apparently a grab for power or an abuse of power, Where is the Congress? What is Congress doing about it?

Congress is a co-equal branch of Government. We have just as much of a right and a responsibility to determine the course of events in this country as does the executive branch. This subcommittee, therefore, exemplifies the valid and essential power of the Congress of the United States in inquiring into the treatment that those who take a stand on behalf of the truth are receiving at the hands of those who have sullied the truth in the executive branch.

The underlying question at this hearing today is, who will speak up? Who will speak up if those who have taken the risks to tell the truth are publicly punished, stripped of their positions, pushed aside? Who will speak up at a moment of peril? Who will speak up to defend this country's reputation, its honor?

We are here today to take a stand on behalf of those who took a stand on behalf of America. So I want to welcome the whistleblowers who are with us. I know that they have been eager to tell their stories, and they are patriots for coming forward. They risked their jobs, their reputations, to make this country safer and our Government more responsible by pointing out our Nation's security vulnerabilities and Government abuses.

How different our world and our Nation would be, how safer it would be against global terrorism, had, for example, we listened to FBI Agent Coleen Rowley's warnings prior to September 11th.

Model employees are either ignored or told to keep their mouths shut. Their honesty is not rewarded but, rather, they and others in law enforcement, national security, and the intelligence community are punished through a systematic and harsh series of personal and professional retaliations.

Let me state clearly that there is absolutely nothing subtle about the retaliation which whistleblowers face. Scare tactics are used to enforce discipline to warn other potential whistleblowers against coming forward. National security whistleblowers are subject to harassment, to transfers or demotion or unrelated personal attacks about their sexual activities or personal finances. Instead of examining merits of allegations, the story becomes shifted to the whistleblower's conduct.

You only need to look at what is happening with the goings-on in the National Security Agency right now, so-called leaks of information, instead of addressing exactly what the problem is, the attack suddenly has shifted to the people that are putting forth the information.

Are we interested in either getting at the truth or are we interested in attacking the truth tellers? That is one of the questions that has to be answered here today. It seems that no infraction is too small to use against a whistleblower. They may have their security clearances suspended, as we will hear, or revoked, essen-

tially preventing them from ever working in the intelligence community or the national security community again. These are Federal employees who were apparently trustworthy enough to routinely handle the most sensitive top secret information in our country, passed extensive background checks, but once they come forward with information of importance to the American people and defending our national honor, people are suddenly viewed as suspicious troublemakers when they blow the whistle. They may even be forced to undergo psychiatric examinations to see if they are mentally stable enough to perform their duties.

This is a throwback to what we used to hear about in the Soviet Union. In the old Soviet Union, if somebody was challenging the Politburo or the practices of the government in some public way and they were insiders, well, suddenly they ended up getting shipped off to a psychiatric clinic. Methods of retaliation are outrageous, and we should all be offended that this occurs with seeming regularity and impunity in our Federal agencies.

What is even more egregious to me is there is a double standard for national security whistleblowers. Because of the sensitivity of the information they work on, they do not have the same protection as other Civil Service employees. They are not allowed to speak freely to Congress, are not the subjects of the already weak Whistleblower Protection Act of 1994, and have little recourse from third parties ostensibly established to hear their claims, such as the Merit Systems Protection Board or the judicial system.

So who gets to hear their claims? Well, it is left to the employing agencies who are the ones who are often exposed, who then turn around and act as judge and jury when national whistleblowers come forward with an allegation. This should be the first place for recourse, not the first and the last.

So, Mr. Chairman, I hope that you will join with those of us on this side of the aisle who will advocate strong legislation to close the loopholes in our whistleblower protection laws. These basic protections should be applicable to all Federal employees and Federal contractors across the board. This should not be a partisan issue, and I trust that in calling this hearing today, you will proceed in that spirit. Our Nation's security should be the first priority, not protecting agencies or not protecting management from embarrassment or damaging information. I look forward to working with you on such legislation.

Again, Mr. Chairman, I want to thank you for working with us to hold this hearing and to include the witnesses we requested. I think their testimony will show the urgency of the needed reform of our whistleblower laws, and I hope they are going to be willing and allowed to speak freely and candidly and we can rectify the retaliations that people have suffered. I want to say that again. We need to rectify the retaliations which people have suffered because they had the courage to tell the truth.

Thank you, Mr. Chairman, and I want to welcome the witnesses.

[The information referred to follows:]

The **New York Times**

December 16, 2005 Friday
Correction Appended
Late Edition - Final

SECTION: Section A; Column 1; Foreign Desk; Pg. 1

LENGTH: 3633 words

HEADLINE: Bush Lets U.S. Spy on Callers Without Courts

BYLINE: By JAMES RISEN and ERIC LICHTBLAU; Barclay Walsh contributed research for this article.

DATELINE: WASHINGTON, Dec. 15

BODY:

Months after the Sept. 11 attacks, President Bush secretly authorized the **National Security Agency** to eavesdrop on Americans and others inside the United States to search for evidence of terrorist activity without the court-approved warrants ordinarily required for domestic spying, according to government officials.

Under a presidential order signed in 2002, the intelligence agency has monitored the international telephone calls and international e-mail messages of hundreds, perhaps thousands, of people inside the United States without warrants over the past three years in an effort to track possible "dirty numbers" linked to Al Qaeda, the officials said. The agency, they said, still seeks warrants to monitor entirely domestic communications.

The previously undisclosed decision to permit some eavesdropping inside the country without court approval was a major shift in American intelligence-gathering practices, particularly for the **National Security Agency,** whose mission is to spy on communications abroad. As a result, some officials familiar with the continuing operation have questioned whether the surveillance has stretched, if not crossed, constitutional limits on legal searches.

"This is really a sea change," said a former senior official who specializes in national security law. "It's almost a mainstay of this country that the **N.S.A.** only does foreign searches."

Nearly a dozen current and former officials, who were granted anonymity because of the classified nature of the program, discussed it with reporters for The **New York Times** because of their concerns about the operation's legality and oversight.

According to those officials and others, reservations about aspects of the program have also been expressed by Senator John D. Rockefeller IV, the West Virginia Democrat who is the vice chairman of

the Senate Intelligence Committee, and a judge presiding over a secret court that oversees intelligence matters. Some of the questions about the agency's new powers led the administration to temporarily suspend the operation last year and impose more restrictions, the officials said.

The Bush administration views the operation as necessary so that the agency can move quickly to monitor communications that may disclose threats to the United States, the officials said. Defenders of the program say it has been a critical tool in helping disrupt terrorist plots and prevent attacks inside the United States.

Administration officials are confident that existing safeguards are sufficient to protect the privacy and civil liberties of Americans, the officials say. In some cases, they said, the Justice Department eventually seeks warrants if it wants to expand the eavesdropping to include communications confined within the United States. The officials said the administration had briefed Congressional leaders about the program and notified the judge in charge of the Foreign Intelligence Surveillance Court, the secret Washington court that deals with national security issues.

The White House asked The **New York Times** not to publish this article, arguing that it could jeopardize continuing investigations and alert would-be terrorists that they might be under scrutiny. After meeting with senior administration officials to hear their concerns, the newspaper delayed publication for a year to conduct additional reporting. Some information that administration officials argued could be useful to terrorists has been omitted.

Dealing With a New Threat

While many details about the program remain secret, officials familiar with it say the **N.S.A.** eavesdrops without warrants on up to 500 people in the United States at any given time. The list changes as some names are added and others dropped, so the number monitored in this country may have reached into the thousands since the program began, several officials said. Overseas, about 5,000 to 7,000 people suspected of terrorist ties are monitored at one time, according to those officials.

Several officials said the eavesdropping program had helped uncover a plot by Iyman Faris, an Ohio trucker and naturalized citizen who pleaded guilty in 2003 to supporting Al Qaeda by planning to bring down the Brooklyn Bridge with blowtorches. What appeared to be another Qaeda plot, involving fertilizer bomb attacks on British pubs and train stations, was exposed last year in part through the program, the officials said. But they said most people targeted for **N.S.A.** monitoring have never been charged with a crime, including an Iranian-American doctor in the South who came under suspicion because of what one official described as dubious ties to Osama bin Laden.

The eavesdropping program grew out of concerns after the Sept. 11 attacks that the nation's intelligence agencies were not poised to deal effectively with the new threat of Al Qaeda and that they were handcuffed by legal and bureaucratic restrictions better suited to peacetime than war, according to officials. In response, President Bush significantly eased limits on American intelligence and law enforcement agencies and the military.

But some of the administration's antiterrorism initiatives have provoked an outcry from members of Congress, watchdog groups, immigrants and others who argue that the measures erode protections for civil liberties and intrude on Americans' privacy.

Opponents have challenged provisions of the USA Patriot Act, the focus of contentious debate on Capitol Hill this week, that expand **domestic surveillance** by giving the Federal Bureau of Investigation

more power to collect information like library lending lists or Internet use. Military and F.B.I. officials have drawn criticism for monitoring what were largely peaceful antiwar protests. The Pentagon and the Department of Homeland Security were forced to retreat on plans to use public and private databases to hunt for possible terrorists. And last year, the Supreme Court rejected the administration's claim that those labeled "enemy combatants" were not entitled to judicial review of their open-ended detention.

Mr. Bush's executive order allowing some warrantless eavesdropping on those inside the United States -- including American citizens, permanent legal residents, tourists and other foreigners -- is based on classified legal opinions that assert that the president has broad powers to order such searches, derived in part from the September 2001 Congressional resolution authorizing him to wage war on Al Qaeda and other terrorist groups, according to the officials familiar with the **N.S.A.** operation.

The **National Security Agency,** which is based at Fort Meade, Md., is the nation's largest and most secretive intelligence agency, so intent on remaining out of public view that it has long been nicknamed "No Such Agency." It breaks codes and maintains listening posts around the world to eavesdrop on foreign governments, diplomats and trade negotiators as well as drug lords and terrorists. But the agency ordinarily operates under tight restrictions on any spying on Americans, even if they are overseas, or disseminating information about them.

What the agency calls a "special collection program" began soon after the Sept. 11 attacks, as it looked for new tools to attack terrorism. The program accelerated in early 2002 after the Central Intelligence Agency started capturing top Qaeda operatives overseas, including Abu Zubaydah, who was arrested in Pakistan in March 2002. The C.I.A. seized the terrorists' computers, cellphones and personal phone directories, said the officials familiar with the program. The **N.S.A.** surveillance was intended to exploit those numbers and addresses as quickly as possible, they said.

In addition to eavesdropping on those numbers and reading e-mail messages to and from the Qaeda figures, the **N.S.A.** began monitoring others linked to them, creating an expanding chain. While most of the numbers and addresses were overseas, hundreds were in the United States, the officials said.

Under the agency's longstanding rules, the **N.S.A.** can target for interception phone calls or e-mail messages on foreign soil, even if the recipients of those communications are in the United States. Usually, though, the government can only target phones and e-mail messages in the United States by first obtaining a court order from the Foreign Intelligence Surveillance Court, which holds its closed sessions at the Justice Department.

Traditionally, the F.B.I., not the **N.S.A.**, seeks such warrants and conducts most domestic eavesdropping. Until the new program began, the **N.S.A.** typically limited its **domestic surveillance** to foreign embassies and missions in Washington, New York and other cities, and obtained court orders to do so.

Since 2002, the agency has been conducting some warrantless eavesdropping on people in the United States who are linked, even if indirectly, to suspected terrorists through the chain of phone numbers and e-mail addresses, according to several officials who know of the operation. Under the special program, the agency monitors their international communications, the officials said. The agency, for example, can target phone calls from someone in New York to someone in Afghanistan.

Warrants are still required for eavesdropping on entirely domestic-to-domestic communications, those officials say, meaning that calls from that New Yorker to someone in California could not be monitored without first going to the Federal Intelligence Surveillance Court.

A White House Briefing

After the special program started, Congressional leaders from both political parties were brought to Vice President Dick Cheney's office in the White House. The leaders, who included the chairmen and ranking members of the Senate and House intelligence committees, learned of the **N.S.A.** operation from Mr. Cheney, Lt. Gen. Michael V. Hayden of the Air Force, who was then the agency's director and is now a full general and the principal deputy director of national intelligence, and George J. Tenet, then the director of the C.I.A., officials said.

It is not clear how much the members of Congress were told about the presidential order and the eavesdropping program. Some of them declined to comment about the matter, while others did not return phone calls.

Later briefings were held for members of Congress as they assumed leadership roles on the intelligence committees, officials familiar with the program said. After a 2003 briefing, Senator Rockefeller, the West Virginia Democrat who became vice chairman of the Senate Intelligence Committee that year, wrote a letter to Mr. Cheney expressing concerns about the program, officials knowledgeable about the letter said. It could not be determined if he received a reply. Mr. Rockefeller declined to comment. Aside from the Congressional leaders, only a small group of people, including several cabinet members and officials at the **N.S.A.**, the C.I.A. and the Justice Department, know of the program.

Some officials familiar with it say they consider warrantless eavesdropping inside the United States to be unlawful and possibly unconstitutional, amounting to an improper search. One government official involved in the operation said he privately complained to a Congressional official about his doubts about the program's legality. But nothing came of his inquiry. "People just looked the other way because they didn't want to know what was going on," he said.

A senior government official recalled that he was taken aback when he first learned of the operation. "My first reaction was, 'We're doing what?' " he said. While he said he eventually felt that adequate safeguards were put in place, he added that questions about the program's legitimacy were understandable.

Some of those who object to the operation argue that is unnecessary. By getting warrants through the foreign intelligence court, the **N.S.A.** and F.B.I. could eavesdrop on people inside the United States who might be tied to terrorist groups without skirting longstanding rules, they say.

The standard of proof required to obtain a warrant from the Foreign Intelligence Surveillance Court is generally considered lower than that required for a criminal warrant -- intelligence officials only have to show probable cause that someone may be "an agent of a foreign power," which includes international terrorist groups -- and the secret court has turned down only a small number of requests over the years. In 2004, according to the Justice Department, 1,754 warrants were approved. And the Foreign Intelligence Surveillance Court can grant emergency approval for wiretaps within hours, officials say.

Administration officials counter that they sometimes need to move more urgently, the officials said. Those involved in the program also said that the **N.S.A.**'s eavesdroppers might need to start monitoring large batches of numbers all at once, and that it would be impractical to seek permission from the Foreign Intelligence Surveillance Court first, according to the officials.

The **N.S.A.** domestic spying operation has stirred such controversy among some national security officials in part because of the agency's cautious culture and longstanding rules.

Widespread abuses -- including eavesdropping on Vietnam War protesters and civil rights activists -- by American intelligence agencies became public in the 1970's and led to passage of the Foreign Intelligence Surveillance Act, which imposed strict limits on intelligence gathering on American soil. Among other things, the law required search warrants, approved by the secret F.I.S.A. court, for wiretaps in national security cases. The agency, deeply scarred by the scandals, adopted additional rules that all but ended domestic spying on its part.

After the Sept. 11 attacks, though, the United States intelligence community was criticized for being too risk-averse. The **National Security Agency** was even cited by the independent 9/11 Commission for adhering to self-imposed rules that were stricter than those set by federal law.

Concerns and Revisions

Several senior government officials say that when the special operation began, there were few controls on it and little formal oversight outside the **N.S.A.** The agency can choose its eavesdropping targets and does not have to seek approval from Justice Department or other Bush administration officials. Some agency officials wanted nothing to do with the program, apparently fearful of participating in an illegal operation, a former senior Bush administration official said. Before the 2004 election, the official said, some **N.S.A.** personnel worried that the program might come under scrutiny by Congressional or criminal investigators if Senator John Kerry, the Democratic nominee, was elected president.

In mid-2004, concerns about the program expressed by national security officials, government lawyers and a judge prompted the Bush administration to suspend elements of the program and revamp it.

For the first time, the Justice Department audited the **N.S.A.** program, several officials said. And to provide more guidance, the Justice Department and the agency expanded and refined a checklist to follow in deciding whether probable cause existed to start monitoring someone's communications, several officials said.

A complaint from Judge Colleen Kollar-Kotelly, the federal judge who oversees the Federal Intelligence Surveillance Court, helped spur the suspension, officials said. The judge questioned whether information obtained under the **N.S.A.** program was being improperly used as the basis for F.I.S.A. wiretap warrant requests from the Justice Department, according to senior government officials. While not knowing all the details of the exchange, several government lawyers said there appeared to be concerns that the Justice Department, by trying to shield the existence of the **N.S.A.** program, was in danger of misleading the court about the origins of the information cited to justify the warrants.

One official familiar with the episode said the judge insisted to Justice Department lawyers at one point that any material gathered under the special **N.S.A.** program not be used in seeking wiretap warrants from her court. Judge Kollar-Kotelly did not return calls for comment.

A related issue arose in a case in which the F.B.I. was monitoring the communications of a terrorist suspect under a F.I.S.A.-approved warrant, even though the **National Security Agency** was already conducting warrantless eavesdropping.

According to officials, F.B.I. surveillance of Mr. Faris, the Brooklyn Bridge plotter, was dropped for a short time because of technical problems. At the time, senior Justice Department officials worried what would happen if the **N.S.A.** picked up information that needed to be presented in court. The government would then either have to disclose the **N.S.A.** program or mislead a criminal court about how it had

gotten the information.

Several national security officials say the powers granted the **N.S.A.** by President Bush go far beyond the expanded counterterrorism powers granted by Congress under the USA Patriot Act, which is up for renewal. The House on Wednesday approved a plan to reauthorize crucial parts of the law. But final passage has been delayed under the threat of a Senate filibuster because of concerns from both parties over possible intrusions on Americans' civil liberties and privacy.

Under the act, law enforcement and intelligence officials are still required to seek a F.I.S.A. warrant every time they want to eavesdrop within the United States. A recent agreement reached by Republican leaders and the Bush administration would modify the standard for F.B.I. wiretap warrants, requiring, for instance, a description of a specific target. Critics say the bar would remain too low to prevent abuses.

Bush administration officials argue that the civil liberties concerns are unfounded, and they say pointedly that the Patriot Act has not freed the **N.S.A.** to target Americans. "Nothing could be further from the truth," wrote John Yoo, a former official in the Justice Department's Office of Legal Counsel, and his co-author in a Wall Street Journal opinion article in December 2003. Mr. Yoo worked on a classified legal opinion on the **N.S.A.**'s domestic eavesdropping program.

At an April hearing on the Patriot Act renewal, Senator Barbara A. Mikulski, Democrat of Maryland, asked Attorney General Alberto R. Gonzales and Robert S. Mueller III, the director of the F.B.I., "Can the **National Security Agency,** the great electronic snooper, spy on the American people?"

"Generally," Mr. Mueller said, "I would say generally, they are not allowed to spy or to gather information on American citizens."

President Bush did not ask Congress to include provisions for the **N.S.A. domestic surveillance** program as part of the Patriot Act and has not sought any other laws to authorize the operation. Bush administration lawyers argued that such new laws were unnecessary, because they believed that the Congressional resolution on the campaign against terrorism provided ample authorization, officials said.

The Legal Line Shifts

Seeking Congressional approval was also viewed as politically risky because the proposal would be certain to face intense opposition on civil liberties grounds. The administration also feared that by publicly disclosing the existence of the operation, its usefulness in tracking terrorists would end, officials said.

The legal opinions that support the **N.S.A.** operation remain classified, but they appear to have followed private discussions among senior administration lawyers and other officials about the need to pursue aggressive strategies that once may have been seen as crossing a legal line, according to senior officials who participated in the discussions.

For example, just days after the Sept. 11, 2001, attacks on New York and the Pentagon, Mr. Yoo, the Justice Department lawyer, wrote an internal memorandum that argued that the government might use "electronic surveillance techniques and equipment that are more powerful and sophisticated than those available to law enforcement agencies in order to intercept telephonic communications and observe the movement of persons but without obtaining warrants for such uses."

Mr. Yoo noted that while such actions could raise constitutional issues, in the face of devastating terrorist attacks "the government may be justified in taking measures which in less troubled conditions could be seen as infringements of individual liberties."

The next year, Justice Department lawyers disclosed their thinking on the issue of warrantless wiretaps in national security cases in a little-noticed brief in an unrelated court case. In that 2002 brief, the government said that "the Constitution vests in the President inherent authority to conduct warrantless intelligence surveillance (electronic or otherwise) of foreign powers or their agents, and Congress cannot by statute extinguish that constitutional authority."

Administration officials were also encouraged by a November 2002 appeals court decision in an unrelated matter. The decision by the Foreign Intelligence Surveillance Court of Review, which sided with the administration in dismantling a bureaucratic "wall" limiting cooperation between prosecutors and intelligence officers, cited "the president's inherent constitutional authority to conduct warrantless foreign intelligence surveillance."

But the same court suggested that national security interests should not be grounds "to jettison the Fourth Amendment requirements" protecting the rights of Americans against undue searches. The dividing line, the court acknowledged, "is a very difficult one to administer."

URL: http://www.nytimes.com

CORRECTION-DATE: December 28, 2005

CORRECTION:

Because of an editing error, a front-page article on Dec. 16 about a decision by President Bush to authorize the **National Security Agency** to eavesdrop on Americans and others inside the United States to search for evidence of terrorist activity without warrants ordinarily required for domestic spying misstated the name of the court that would normally issue those warrants. It is the Foreign -- not Federal --Intelligence Surveillance Court.

GRAPHIC: Photo: In 2002, President Bush toured the **National Security Agency** at Fort Meade, Md., with Lt. Gen. Michael V. Hayden, who was then the agency's director and is now a full general and the principal deputy director of national intelligence. (Photo by Doug Mills/Associated Press)(pg. A16)
Chart: "A Half-Century of Surveillance"HISTORY -- Created in 1952, the **National Security Agency** is the biggest American intelligence agency, with more than 30,000 employees at Fort Meade, Md., and listening posts around the world. Part of the Defense Department, it is the successor to the State Department's "Black Chamber" and American military eavesdropping and code-breaking operations that date to the early days of telegraph and telephone communications.MISSION -- The **N.S.A.** runs the eavesdropping hardware of the American intelligence system, operating a huge network of satellites and listening devices around the world. Traditionally, its mission has been to gather intelligence overseas on foreign enemies by breaking codes and tapping into telephone and computer communications.SUCCESSES -- Most of the agency's successes remain secret, but a few have been revealed. The agency listened to Soviet pilots and ground controllers during the shooting down of a civilian South Korean airliner in 1983
traced a disco bombing in Berlin in 1986 to Libya through diplomatic messages

and, more recently, used the identifying chips in cellphones to track terrorist suspects after the 2001 attacks.DOMESTIC ACTIVITY -- The disclosure in the 1970's of widespread surveillance on political dissenters and other civil rights abuses led to restrictions at the **N.S.A.** and elsewhere on the use of domestic wiretaps. The **N.S.A.** monitors United Nations delegations and some foreign embassy lines on American soil, but is generally prohibited from listening in on the conversations of anyone inside the country without a special court order.OFFICIAL RULES -- Since the reforms of the late 1970's, the **N.S.A.** has generally been permitted to target the communications of people on American soil only if they are believed to be "agents of a foreign power" -- a foreign nation or international terrorist group -- and a warrant is obtained from the Foreign Intelligence Surveillance Court.EXPANDED ROLE -- Months after the terror attacks of Sept. 11, 2001, President Bush signed a secret executive order that relaxed restrictions on domestic spying by the **N.S.A.**, according to officials with knowledge of the order. The order allows the agency to monitor without warrants the international phone calls and e-mail messages of some Americans and others inside the United States.(pg. A16)

LOAD-DATE: December 16, 2005

Mr. SHAYS. I thank the gentleman.

At this time the Chair would recognize the gentlelady from New York, Carolyn Maloney.

Mrs. MALONEY. Thank you, Mr. Chairman, for calling this hearing and Ranking Member Waxman, and I truly appreciate your continued attention to this issue. It is tremendously important, I would say, to the national security of our country. And when we do work on this issue, it reminds me of the old adage, "The truth shall set you free."

Unfortunately, it appears that the current administration has taken this to a new level, and I cite the examples that Chairman Waxman mentioned earlier of the Wilsons and General Shinseki and others. The truth will set you free because if you speak up, you get fired. And we all know that the whistleblower protections are weak and that the main law is the Whistleblower Protection Act. However, this law has been weakened by recent court decisions, and even the weak protections offered under this law do not apply to national security whistleblowers from the uniformed military, including the FBI, the CIA, the Defense Intelligence Agency, the National Security Agency, and the contractors at these very extremely important agencies.

Complicating the situation is the veil of secrecy most of their work is covered by. This subcommittee has repeatedly heard from people who have had their security clearances revoked after blowing the whistle on what they felt was a breach of security for our country. And we have been told that wrongdoers have been allowed to continue their actions while the whistleblower has been made to be the one to suffer.

Clearly, we must fully protect our national security, but we also must provide secure avenues for illegal activity to be swiftly dealt with. That is why back in September, when the full committee was marking up H.R. 1317, the Federal Employee Protection of Disclosure Act, that I offered the amendment that would make it clear that whistleblower protections are extended to employees in national security and the intelligence community. I believe that is an extremely important, substantive amendment. Regrettably, it failed along party lines, but the majority indicated, and I appreciate their statements, that their opposition was based on the fact that we had not had adequate discussion and hearings on it, and that they simply did not know enough about the amendment to support it.

So it is my hope that today after this hearing and our subcommittee's understanding of it on this subject, that my colleagues on the Republican side of the aisle will be able to support this effort in the future.

As Mr. Waxman mentioned in his opening comments, our staffs have been working on legislation based on the amendment that I just mentioned and that would extend the protections of whistleblower protections to employees of national security and the intelligence community. I hope that after this hearing we will be able to work together and pass this into law.

Again, I thank the chairman and ranking member for holding these hearings. I look forward very much to the testimony, and I appreciate all the panelists being here.

Thank you very much. I yield back.

Mr. SHAYS. Thank you, Mrs. Maloney.

At this time the Chair would recognize Mr. Van Hollen from Maryland.

Mr. VAN HOLLEN. Thank you, Mr. Chairman, and let me start by thanking you for holding this hearing today. As has been said, this is not a partisan issue. This should not be a Republican issue or a Democratic issue. This is an issue that I think is important to the American people to make sure they have confidence in the integrity of their own Government. I think the American people are questioning the integrity of that Government these days, and it is important that they know that people within our Government, civil servants, whether they are in the national security apparatus or whether they are in our civil institutions on the civilian side, that people who see and hear wrongdoing within those agencies are free to come forward and report it without fear of being punished, without fear of being retaliated against for coming forward with the truth. And I think the integrity of our national security institutions depends on people having faith and confidence that is going to happen, that people will be able to come forward if they see waste, fraud, abuse, if they see law breaking, if they see coverup.

So I think this is a very important hearing, Mr. Chairman, and I think it is an important step in helping to restore the confidence of the American people in our Government and making sure that indeed we do put safety first and the public safety first and the national security interests first and make sure that people who are telling the truth are free to come forward without fear of reprisal. And it is important that people under that these are people who are putting their own careers at risk. This is not an easy thing to do to come forward. And as has been said, I think these are true patriots, and we should welcome them in the interest of our own security.

So thank you, Mr. Chairman, for holding this hearing.

Mr. SHAYS. I thank the gentleman.

Before calling on our witnesses, we will do a few UCs.

I ask unanimous consent that all members of the subcommittee be permitted to place an opening statement in the record and that the record remain open for 3 days for that purpose, and without objection, so ordered.

I ask further unanimous consent that all witnesses be permitted to include their written statements in the record, and without objection, so ordered.

I ask unanimous consent that Mr. Waxman's request to put a statement of Michael S. Nowacki, former staff sergeant, U.S. Army, and then a statement with a letter of Concerned Foreign Service Officers, dated February 3rd, and without objection, will be put in the record.

I ask further unanimous consent that the following be made part of the record: a letter from the subcommittee dated November 10, 2005, inviting the CIA Inspector General John L. Helgerson to participate in today's hearing; and a letter from the CIA Office of Legislative Affairs indicating the CIA's Office of the Inspector General

"has never received, nor had to investigate, a whistleblower complaint in which an employee claimed that their clearances were revoked as a method of retaliation for their whistleblower activities."

Without objection, these letters will be made part of the record.

[The information referred to follows:]

November 10, 2005

Mr. John L. Helgerson, Inspector General
Office of the Inspector General
Central Intelligence Agency
NHB 2X30
Washington, D.C. 20505

Dear Mr. Helgerson:

The Subcommittee on National Security, Emerging Threats, and International Relations with oversight responsibilities for homeland security programs, has scheduled a hearing entitled, *National Security Whistleblowers in the post-9/11 Era: Lost in a Labyrinth and Facing Retaliation by Security Clearance Revocation* for Tuesday, December 6, 2005 at 10:00 a.m. in room 2154, Rayburn House Office Building, Washington, D.C. The Subcommittee would benefit from hearing your views and you are invited to testify.

The purpose of the hearing is to determine whether whistleblower protection laws, regulations, policies and procedures sufficiently protect government employees in sensitive positions against certain types of retaliation. Specifically, the Subcommittee would like to discuss revocation of an employee's national security clearance as a method of retaliation against those who attempt to point out wrongdoing in security agencies. Whistleblowers at key government agencies are vulnerable to unique forms of retaliation since no independent procedure for due process exists to provide a means for redress in cases of security clearance suspension or revocation.

There are currently very limited opportunities for employees of the CIA, DOD, DOE and DOJ (FBI), among others, to seek redress when their security clearance is suspended or revoked. Each department and agency has been left to deal with issues of security clearance reprisals on their own. Inspectors General within each agency are most often called upon to conduct investigations for whistleblowers experiencing retaliation. A closer review of these efforts on the part of the agencies and departments will help to determine whether inconsistent, confusing and a seemingly arbitrary patchwork of systems and procedures reflect agencies' tendencies to exploit loopholes in current whistleblower laws.

Witnesses testifying before the Subcommittee are asked to bring 80 copies of their written testimony on the day of the hearing. In addition, witnesses are asked to fax or electronically send to Bob.Briggs@mail.house.gov one copy of their testimony to the subcommittee office at least **three business days (November 30, 2005)** prior to the hearing. The subcommittee fax number is 202-225-2382. We ask that witnesses summarize their written testimony in five minutes, allowing the Subcommittee maximum time for discussion and questions.

Under the Congressional Accountability Act, the House of Representatives must be in compliance with the Americans with Disabilities Act. Persons requiring special accommodations should contact Mr. Robert Briggs, Subcommittee Clerk, at least three (3) days prior to the scheduled hearing. If you have any questions, please contact Lawrence Halloran or Vincent Chase of the Subcommittee staff at 202-225-2548. We look forward to your testimony at the December 6th hearing.

Sincerely,

Christopher Shays
Chairman

cc:
Hon. Tom Davis
Hon. Henry Waxman
Hon. Dennis J. Kucinich
Hon. Kenny Marchant

Central Intelligence Agency

Washington, D.C. 20505

28 November 2005

The Honorable Christopher Shays
Chairman
Subcommittee on National Security,
Emerging Threats, and International Relations
Committee on Government Reform
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I want to thank you for your letter of 10 November 2005 inviting CIA's Inspector General to testify on 6 December 2005 at the Committee's hearing entitled, *National Security Whistleblowers in the post-9/11 Era: Lost in a Labyrinth and Facing Retaliation by Security Clearance Revocation.*

I am sorry that the Inspector General will not be able to attend your hearing. I would like to take this opportunity to tell you, with regard to the purpose of your subcommittee's hearing, CIA's Office of Inspector General has never received, nor had to investigate, a whistleblower complaint in which an employee claimed that their clearances were revoked as a method of retaliation for their whistleblower activities. The Inspector General believes, therefore, that CIA will not be able to contribute any information of significance to your subcommittee's activity.

If you desire, I would be pleased to forward to your subcommittee a copy of the CIA's policy regulation identifying the processes, rights, and protections given whistleblowers.

Sincerely,

Joe Wippl
Director of Congressional Affairs

Mr. SHAYS. I do want to comment that I think it is really very surprising that the Inspector General would communicate through us through the Director of Congressional Affairs. I like to view that the IG's office is totally independent and would have their own way of communicating with us without having to go directly through the department.

Do we have another unanimous consent?

Mr. WAXMAN. Before you leave that one, I find that an amazing letter because the Director of Congressional Affairs at the CIA, and I think you are correct in saying it, I do not know why he has to respond to your letter to the CIA. But, in effect, he says there is no reason for the CIA to come here because they have "never received, nor had to investigate, a whistleblower complaint in which an employee claimed their clearances were revoked as a method of retaliation for their whistleblower activities." Well, this hearing today I think is going to make it very clear that cannot possibly be the case. Not everybody is from CIA, but it seems to me that we do have people from the CIA that have been retaliated against. It is almost as if the CIA could not even find out what is going on in its own organization, let alone what is going on elsewhere around the world.

So I just wanted to make that comment and join you in my concern that they should be more forthcoming.

Mr. SHAYS. Mr. Kucinich.

Mr. KUCINICH. I am appreciative of the fact that the chairman brought that letter forward because any of us who have ever dealt with the CIA understands that letter is lacking in veracity, to put it mildly. I think that while we are going to have our hands full today, Mr. Chairman, with the testimony that we are going to receive and evaluate and then issue a report, this letter, Mr. Chairman, offers a whole new possibility for a line of inquiry into the Central Intelligence Agency and how they are trying to escape oversight, which they are not free from, by the way.

So I just wanted to say hi. [Laughter.]

Mr. SHAYS. I would ask unanimous consent that the following be made part of the record: two CRS memoranda concerning the applicability of the Privacy Act to congressional investigative inquiries, and the Department of Justice IG report of the investigation into allegations from Michael German.

[The information referred to follows:]

Congressional Research Service • Library of Congress • Washington, D.C. 20540

Memorandum October 3, 2000

TO

FROM : Morton Rosenberg MR
Specialist in American Public Law
American Law Division

SUBJECT : Applicability of the Privacy Act to Congressional Investigatory Inquiries to Agency Officials

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At an investigatory hearing to be held by your Committee on Wednesday, October 4, 2000, you have invited officials of the Environmental Protection Agency (EPA) to testify with regard to claims of discrimination and retaliation that have been brought by EPA employees who have been cooperating with the Committee. EPA has indicated that the invited witnesses will not testify as to information relating to the particular discrimination claims on the ground that it would violate the Privacy Act, 5 U.S.C. 552a. You inquire as to the substantiality of the Agency's claim.

Our review of the pertinent provisions of the Privacy Act, and case law construction of those provisions, as well as congressional practice, indicates that such a claim is insubstantial.

The Privacy Act is designed to provide safeguards for individuals against invasions of personal privacy by requiring government agencies to maintain accurate records and providing individuals with more control over the gathering, discrimination, and accuracy of government information about themselves. To secure this goal the Act precludes an agency from disclosing information in its files to any person or to another agency without the prior written consent of the individual to whom the information pertains. See 5 U.S.C. 552a (b). This broad prohibition is subject to 12 exceptions, one of which relates to disclosures to Congress and its committees. Section 552a (b) (9) permits disclosure of covered information without the consent of the individual "to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any joint committee." A recent court of appeals ruling held that this provision "unambiguously permits agencies to disclose personal information about an individual without the individuals consent to a Congressional subcommittee that has jurisdiction over the matter to which the information pertains." *Devine* v. *United States*, 202 F. 3d 547, 551 (2d Cir. 2000). The Office of Management and Budget has indicated in its Privacy Act guidance regulations that "disclosure" can be by any means of communication

--written, oral, electronic, or mechanical. See, OMB Guidelines, 40 Fed. Reg. 28, 948, 28, 953 (1975).

In addition, we are aware of a rejection of a similar claim during the House Government Reform and Oversight Committee's investigation of the so-called "Filegate" matter. There, a witness, a former White House Counsel Office attorney, William Kennedy, refused to answer questions about whether he knew of any drug use on the part of Craig Livingstone, and if he did know, did that knowledge enter into his decision as to whether or not to hire him for a sensitive security position in the White House. Kennedy refused to answer on the ground that it would violate Mr. Livingstone's Privacy Act rights. The Committee's Chairman, Bill Clinger, rejected the claim and ordered him to respond, warning that a continued refusal might subject him to a contempt of Congress citation. See, Hearing, "Security of FBI Background Files, June 26, 1996," before the House Committee on Government Reform and Oversight, 104th Cong., 2d Sess. 546-551 (1996).

You have also inquired whether a voluntary witness who refuses to respond to pertinent questions may be held in contempt. The Supreme Court so held in *Sinclair* v. *United States*, 279 U.S. 263 (1929).

Because of the short deadline imposed, our response has been of necessity short and summary. If we may be of further assistance in this matter, please do not hesitate to call.

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Memorandum October 4, 2000

TO : [redacted]

FROM : Morton Rosenberg
Specialist in American Public Law
American Law Division

SUBJECT : Follow-Up Questions on Congressional Exemption From The Privacy Act

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In our memo to you of October 3, 2000, we indicated that Section 552a(b)(9) of the Privacy Act provides an exemption from the disclosure prohibitions of the Act for jurisdictional committees of the Congress seeking covered information. You have been subsequently notified that the EPA General Counsel has advised agency officials who may be witnesses at your hearing today that they nonetheless run the risk of civil and criminal sanctions under the Act if they disclose covered privacy information during a public hearing. The rationale for this position is that the statutory exemption applies to Congress alone and "does not protect you or the Agency from liability if the disclosure is made simultaneously to the Congress *and others*, which would occur if disclosure were to be made at a public congressional committee hearing." (*emphasis in original*) Such a view of the congressional exemption would appear to be inconsistent with existing law.

Numerous Supreme Court precedents establish and support a broad and encompassing power in the Congress to engage in oversight and investigation that reaches all sources of information that enable it to carry out its legislative function. In the absence of a countervailing constitutional privilege or a self-imposed statutory restriction upon its authority, Congress and its committees have virtually plenary power to compel information needed to discharge its legislative function from executive agencies, private persons and organizations, and, within certain constraints, the information so obtained may be made public. *E.g., McGrain* v. *Daugherty*, 272 U.S. 135 (1927); *Watkins* v. *United States*, 354 U.S. 178 (1957); *Barenblatt v. United States*, 360 U.S. 109 (1950); *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975); *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977); see also, *United States* v. *A.T.T.*, 551 F. 2d 384 (D.C.Cir. 1976) and 567 F. 2d 1212 (D.C. Cir. 1977).

In the analogous situations of statutory confidentiality or non-disclosure provisions which bar public disclosure of information but which are not explicitly applicable to Congress, the courts have consistently held that agencies and private parties may not deny Congress access to such information on the basis of such provisions. See, *e.g., F.T.C.* v. *Owens-Corning Fiberglass Corp.*, 626 F. 2d at 966, 970 (D.C. Cir. 1980); *Exxon Corp.* v.

F.T.C., 589 F. 2d 582, 585-86 (D.C. Cir 1978), *cert denied*, 441 U.S. 943 (1979); *Ashland Oil Co., Inc.* v. *F.T.C.* 548 F. 2d 977, 979 (D.C. Cir. 1976). It has also been held that release to a congressional requestor is not deemed to be disclosure to the public generally. *F.T.C.* v. *Owens-Corning Fiberglass Corp.* 626 F. 2d at 970; *Exxon Corp* v. *F.T.C.*, 589 F. 2d at 589; *Ashland Oil Co., Inc.* v. *F.T.C.*, 548 F. 2d at 979; *Moon* v. *CIA*, 514 F. Supp. 836, 840-41 (SDNY 1981). Nor may a court block congressional disclosure of information obtained from an agency or private party, at least when disclosure would serve a valid legislative purpose. *Doe* v. *McMillan*, 412 U.S. 306 (1973); *F.T.C.* v. *Owens-Corning Fiberglass Corp.*, *supra*, 626 F. 2d at 970.

In view of this case law precedent, it appears unlikely that a court would hold that Congress, in explicitly providing itself with such a broad exemption from the Privacy Act, implicitly qualified that exemption to disallow receiving the information in a public hearing, a traditional and routine manner in which it obtains information.

U.S. Department of Justice

Office of the Inspector General

January 18, 2006

The Honorable Christopher Shays
Chairman
Subcommittee on National Security, Emerging
Threats, and International Relations
Committee on Government Reform
U.S. House of Representatives
2157 Rayburn House Office Building
Washington, DC 20515-6143

Attention: Vincent Chase

Dear Mr. Chairman:

I write in response to your letter of January 17, 2006, in which you requested a copy of an investigation completed recently by the Office of the Inspector General that examined allegations raised by FBI Special Agent Michael German.

This report contains information that may be protected by the Privacy Act or that may otherwise impact the privacy interests of certain individuals. We are providing this report to you in accordance with the Congressional disclosure exception to the Privacy Act, 5 U.S.C. § 552a(b)(9). We ask that you treat this report with appropriate sensitivity.

Please contact us if you have any questions.

Sincerely,

Glenn A. Fine
Inspector General

Enclosure

U.S. Department of Justice
Office of the Inspector General

Report of Investigation into Allegations from Michael German

January 12, 2006

I. INTRODUCTION

The Office of the Inspector General (OIG) investigated allegations raised by former Federal Bureau of Investigation (FBI) Special Agent Michael German that he was retaliated against for criticizing the handling of a terrorism investigation by the FBI's Orlando Resident Agency (RA), which is part of the FBI's Tampa Division. In a letter dated September 10, 2002, German complained to his supervisors that the terrorism investigation in Orlando was being mishandled so seriously that the Orlando RA was losing the opportunity to launch a proactive undercover operation that German believed could uncover a terrorism financing plot. At the time he sent his letter, German was assigned to the FBI's Atlanta Division and had been selected as one of the undercover agents for the Orlando investigation.

Subsequent to his September 2002 letter, German made additional allegations that officials at FBI Headquarters and in the Tampa Division failed to respond adequately to his complaints and that some officials were covering up their mistakes in the terrorism case by making false assertions in official documents.

In October 2003, German also alleged that in retaliation for his complaints, he was disparaged by FBI supervisors, excluded from the Orlando investigation, and removed as a trainer from elite FBI undercover schools, all of which in his view ruined his reputation in the FBI as an experienced undercover agent. German subsequently resigned from the FBI in June 2004.

After German made his retaliation allegations, the OIG opened in January 2004 an investigation into German's allegations and the FBI's response to his allegations. This report of investigation is organized into seven parts. First, the report presents background information on German, the Orlando terrorism investigation, and the OIG investigations into his allegations. Next, the report summarizes German's allegations. The subsequent four sections analyze German's specific allegations, including his complaints about the FBI's mishandling and mismanagement of the Orlando case, the FBI's alleged failure to respond adequately to German's complaints, the alleged cover-up by the Tampa Division, and the alleged retaliation against German for making the complaints. Finally, we summarize German's response to a draft of this report, as well as our analysis of the main points of that response.

II. BACKGROUND

A. Special Agent Michael German

After obtaining a law degree, German joined the FBI in 1988 as a Special Agent and spent several years investigating white collar crime on the West Coast. He went on to serve in the Boston Division for six years and then transferred to the Atlanta Division in 2000. German began undercover work early in his career and served as the primary undercover agent in several high-profile investigations during his 16-year FBI career.

German told the OIG that after sending his September 2002 letter to his supervisors complaining about the Orlando terrorism investigation, he became increasingly frustrated by the FBI's lack of an appropriate response. He also believed he was being excluded from the Orlando terrorism case by the Tampa Division in retaliation for the letter and was being impeded in his efforts to become involved in other FBI undercover matters.

In January 2004, German took a temporary assignment at the FBI's Behavioral Sciences Unit in Quantico, Virginia. Two months later, he accepted a transfer to the FBI office in Maui, Hawaii, his office of preference, but he resigned from the FBI in June 2004, a few days before he was due to report to Maui. German said he resigned because he had been retaliated against for criticizing the handling of the Orlando case and because he was frustrated with the FBI's failure to address his complaints about the case.

B. The Orlando Investigation

In early 2002, the Orlando RA received information from an informant who alleged that two individuals ("subjects") had a meeting that the informant attended in which the subjects allegedly discussed "merging activities" and engaging in money laundering and weapons sales. Based on this information, the Orlando RA opened a domestic terrorism investigation and considered launching an undercover operation (UCO) into possible future interactions between the two subjects.

A supervisor from the Orlando RA contacted German in the Atlanta Division in March 2002 and invited him to a meeting to discuss the possible UCO. German met with agents in the Orlando RA and concurred that the circumstances were favorable for a successful UCO. German later stated in letters to the FBI that he agreed to serve as the

primary undercover agent because he viewed the case as a very important terrorism investigation. After the meeting, he returned to Atlanta and awaited the completion of the steps required for a UCO to be approved by FBI Headquarters.

Also in March 2002, while German and an Orlando RA case agent for a drug investigation were discussing the terrorism investigation, they realized that the main subject of the drug investigation involved one of the subjects in the terrorism matter. At the suggestion of FBI Headquarters, the terrorism matter was folded into the ongoing drug investigation.

In April 2002, the Orlando RA sent a proposal for a terrorism UCO to the Domestic Terrorism Operations Unit (DTOU) of the FBI's Counterterrorism Division in FBI Headquarters. After reviewing the proposal and supporting materials, the DTOU decided not to support the proposed UCO as a terrorism undercover matter because it did not find a sufficient connection to terrorism. In DTOU's view, the undercover operation appeared to be related primarily to illegal drug activities and not domestic terrorism.

The Tampa Division subsequently opted to pursue the matter as a drug investigation and to be alert for any terrorism-related issues involving the subject in the drug investigation. As of December 2005, no such issues have developed.[1]

C. German's September 2002 Letter

German told the OIG that he learned at the initial meeting in Orlando in March 2002 that the FBI Special Agent leading the terrorism case had not completed many investigative steps that would be critical to a successful UCO. German further stated that he had expressed concern to the agents and supervisors about the lack of documentation in the case, and he became increasingly frustrated over the ensuing weeks that the documentation was not being completed.

After the Orlando RA submitted its UCO proposal to the DTOU in FBI Headquarters in April 2002, German said he also became frustrated in his discussions with staff and managers at FBI Headquarters by what he viewed as their lack of familiarity with the Attorney General Guidelines governing approval of FBI undercover cases. German said that on several occasions he debated with supervisors in the FBI's

[1] Because the drug investigation remains open, the OIG has refrained from providing detailed information about the subjects and about the meetings that the informant secretly recorded.

undercover unit who reviewed the proposed UCO application at FBI Headquarters on what the FBI Guidelines permitted.

German stated that by September 2002 he became so discouraged that he sought counsel from an FBI Assistant Special Agent in Charge (ASAC) in the Atlanta Division. According to German, the ASAC suggested that German set forth his concerns in writing to be forwarded to the appropriate FBI officials. Following that advice, German drafted a 6-page letter dated September 10, 2002, in which he detailed the shortcomings of the Orlando RA's investigation, but expressed the belief that a UCO was still viable in the case. He closed the letter with a request for whistleblower protection. The ASAC forwarded the letter to the FBI Special Agent in Charge (SAC) in Atlanta, the ASAC's counterparts in the FBI's Tampa Division (which includes the Orlando RA), and officials in the FBI's Counterterrorism Division.

German told the OIG that he was troubled by the FBI's lack of an appropriate response to the complaints in his September 2002 letter. German also said the Tampa Division was excluding him from the Orlando terrorism investigation in retaliation for the letter, and he also believed he was being impeded in his efforts to become involved in other FBI UCOs elsewhere because of the letter.

D. The FBI's Reviews of German's Allegations

Within days of German submitting his September 2002 letter to his managers, the Tampa Division received a copy and launched a review, described in greater detail in Section IV.B.1., below, to determine whether a viable terrorism case in Orlando had been missed. The review was led by the division's ASAC and included terrorism specialists in the division. In December 2002, the Tampa Division submitted a report to FBI Headquarters concluding that the terrorism case lacked investigative merit because the subjects had not discussed engaging in terrorist acts in the January 2002 meeting, as the informant had alleged. There was also no discussion at the January meeting of money laundering or weapons sales. The report acknowledged, however, that consistent with German's allegations, the lead agent on the terrorism case was deficient in properly documenting the case. For example, the case agent did not review the recordings made by an informant of the meetings with the subjects of the investigation.

In March 2003, the Inspection Division initiated a separate review of the Orlando terrorism case based on German's September 2002 letter and a December 19, 2002, report German prepared detailing associations that German believed demonstrated that one of the subjects

of the Orlando investigation was actively involved in supporting extremist groups. This review by the Inspection Division, described in greater detail in Section IV.B.2., below, was initiated after German contacted the FBI Director's office in February 2003 raising concerns that a viable terrorism case was being overlooked and that his complaints about the matter were not being taken seriously by the FBI.

In November 2003, the Inspection Division issued findings similar to the Tampa Division's report, concluding that there was not a sufficient nexus to terrorism and that a viable terrorism case had not been missed. According to the review, the subjects did not discuss engaging in terrorist acts during the January meeting. The Inspection Division also concluded that the terrorism case agent had not handled the investigation adequately by failing to document the case promptly and to review the recordings of the meetings between the informant and subjects. In addition, the report noted that Orlando RA supervisors failed to recognize the case agent's deficiencies, and when these deficiencies were brought to their attention, failed to take corrective action.

In addition to raising concerns in his September 2002 letter to his supervisors, German also raised allegations of misconduct against the Orlando case agent and Tampa Division managers to the FBI's Office of Professional Responsibility (OPR). As a result, OPR interviewed German twice, in December 2002 and February 2003, and had him prepare two affidavits. According to German, he expected OPR to initiate an investigation into the potential misconduct he cited. However, during the OIG investigation, OPR officials told the OIG that they decided not to initiate a formal investigation into German's allegations because they believed that the FBI Inspection Division review initiated in March 2003 would address the allegations. In contrast, the lead inspector on the Inspection Division review team told the OIG that the team believed OPR had evaluated the misconduct allegations raised by German and decided not to investigate.

E. OIG Investigation

German notified the OIG in December 2002 that FBI was not taking his allegations seriously. The OIG contacted OPR to inquire about the status of its investigation into German's allegations, and the OIG urged OPR to interview German. The OIG also facilitated a discussion between German and the FBI's Counterterrorism Division (CTD).

In October 2003, German sent the OIG a letter complaining that the FBI was retaliating against him for making the complaints about the handling of the Orlando investigation. The OIG contacted OPR again to

inquire about the status of its investigation. At the time, the Inspection Division review team was in the process of completing its report, which was issued in November 2003. In January 2004, the OIG notified German that we had opened an investigation into his retaliation allegations.

The OIG also decided to investigate German's complaints that FBI managers had failed to respond adequately to his allegations that the Orlando terrorism investigation had been mishandled and mismanaged, and his complaints that some agents and managers were covering up their responsibility for lapses in the Orlando RA's terrorism case.

In addition, the OIG investigated German's allegation that a viable terrorism investigation had been missed. This issue was a central focus of the Tampa Division and Inspection Division reviews, and we relied in part on these reviews. However, we also examined the documents on which German based his allegations of a missed terrorism case and listened to the recordings of meetings between the informant and the subjects.

As part of its review, OIG investigators reviewed documents relating to German's complaints, including his September 2002 letter, six letters that German subsequently sent to others (including the OIG, the FBI, and several members of Congress), e-mail messages, an electronic communication (EC) from German to the FBI's Counterterrorism Division (CTD), chronologies of events prepared by German for the FBI and members of Congress, and the two affidavits German provided to OPR.

The OIG conducted 48 interviews of current and former FBI employees relating to German's allegations, as well as of officials with the U.S. Attorney's Office for the Middle District of Florida and the Justice Department's Office of Legislative Affairs and Office of Enforcement Operations. The OIG conducted one interview of German (along with several follow-up telephone calls), and he provided a signed, sworn statement to the OIG. In addition, the OIG interviewed the primary informant involved in the Orlando terrorism case. The OIG also reviewed nine case files relevant to German's complaints, including the Orlando terrorism case file, the file from the Tampa Division review, and the report from the FBI's Inspection Division review. We also reviewed a partial transcript of the January 2002 meeting provided to the OIG by German and listened to the recording of the January meeting and the recordings of a later meeting and several conversations between the informant and one of the subjects in February 2002.

The OIG also administered two voluntary polygraph examinations of FBI employees relating to documents in the terrorism case that

appeared to have been backdated, and we had forensic analysis conducted on these documents.

III. SUMMARY OF GERMAN'S ALLEGATIONS

The OIG separated German's allegations into four general categories:

1. Mishandling of Orlando Case

In German's September 2002 letter, he alleged that the Orlando terrorism case had been mishandled and mismanaged. Specifically, he alleged that the Orlando case had not been properly investigated or documented and that the supervisors in the Tampa Division and FBI Headquarters had not properly managed the case. He also alleged that a viable terrorism case had been missed.

2. Failure to Respond Adequately to Complaint

German alleged that the FBI failed to respond adequately to his complaints about the Orlando case and conducted overly narrow reviews that did not examine his allegations of misconduct by agents and supervisors.

3. Cover-Up of Lapses in Orlando Case

German alleged that FBI officials in the Orlando RA and the Tampa Division attempted to conceal their lapses in the Orlando case by altering case documents and by making false statements in official correspondence.

4. Retaliation Against German for Making Complaints

German alleged that the FBI retaliated against him for complaining about how the Orlando case had been handled. He believed that because of his complaints he had been excluded from participating at FBI undercover schools and from working as an undercover agent in other FBI matters. He also alleged that in retaliation for making his complaints, a supervisor in Orlando disparaged German and removed him from the Orlando terrorism case. Finally, German alleged that his supervisor in Atlanta did not respond appropriately when German was identified by name in a book about a matter German worked on.

Each of these allegations is discussed in detail below.

IV. GERMAN'S ALLEGATIONS

A. Complaints of FBI Mishandling and Mismanagement of the Orlando Investigation

In German's September 2002 letter, he alleged that the FBI had mishandled and mismanaged the Orlando terrorism case. German repeated these concerns in his first OPR affidavit, dated December 16, 2002. In both the letter and the affidavit, German complained that the case agent on the Orlando terrorism case had mishandled the investigation, and that managers in both the Tampa Division and FBI Headquarters had not properly managed and supported the terrorism case. German also alleged that the mishandling and mismanagement caused a viable terrorism case to be missed.

1. Allegation that Orlando Terrorism Investigation was Not Properly Investigated and Documented

German made several complaints regarding the Orlando investigation and documentation of its terrorism investigation. German complained that the Orlando case agent had not completed reports covering undercover meetings and activities that had occurred several months earlier. German also alleged that the informant violated the law governing the use of a recording device and that this violation also had not been addressed properly. In addition, German stated that basic FBI indices would have informed Orlando agents early on that one of the subjects in the terrorism case was also the main subject of an ongoing drug investigation in the same office. As a result of this discovery, at the direction of DTOU, the terrorism investigation was folded into the ongoing drug investigation, which was handled by the drug investigation case agent. German further stated that the Tampa Division had not responded to a request from CTD to address investigative leads in the case.[2]

The OIG reviewed German's complaint about reports not being completed, and we found that a majority of the investigative reports in the Orlando case were significantly late. In reviewing the case file, the OIG identified a total of 69 reports, of which 43 were reports of investigative activity known as FD-302s. Forty of the 43 FD-302s were prepared by the terrorism case agent, and they took an average of 149

[2] German made the following two additional allegations that the OIG reviewed and concluded did not warrant further investigation: (1) the informant allegedly had not received electronic equipment promised by the terrorism case agent; and (2) supervisors in FBI Headquarters allegedly misinterpreted the Attorney General Guidelines for undercover cases and, as a result, did not assign a sufficiently high priority to provide financial support for the Orlando case.

days from the date of the investigative activity until they were entered into the FBI database. Seven reports from the case agent took over 200 days to be completed. In addition, 21 of the case agent's 40 reports were entered into the database during a 3-week period after German sent his September 2002 letter.

The OIG noted that a report documenting the January 2002 meeting between the informant and the two subjects of the case that became central to the basis for initiating the terrorism investigation took more than 200 days to be entered into the FBI's database. While we did not find evidence demonstrating that investigative activities were never documented, we were concerned about the significant delinquency in preparing many reports, particularly the lateness of the report documenting this key meeting. The OIG also was troubled that 21 investigative activities in the matter were not documented or transcribed until after the Tampa Division had received German's September 2002 letter and Tampa managers had instructed the Orlando RA to review and document the activities.

With respect to German's concerns about misuse of a recording device, the OIG found that the potential violation occurred during the January meeting when the informant left a recording device unattended in a room occupied by the subjects while the informant stepped outside for a few minutes to use the restroom. According to the authorization obtained for this operation, the informant was required to be present during all recordings. In order to record conversations of subjects outside of the informant's presence, federal law requires a different type of authorization that had not been obtained.

The OIG found that about seven months after the January 2002 meeting, German realized during a conversation with the informant that a possible recording violation had occurred and immediately informed the drug investigation case agent.[3] This agent told the OIG that he promptly notified his supervisor and the U.S. Attorney's Office for the Middle District of Florida. The agent said that a prosecutor from the U.S. Attorney's Office instructed him to segregate the recording containing the conversation recorded outside the informant's presence and not to use

[3] German told the OIG that the informant indicated to him that the informant had mentioned to the terrorism case agent when he gave the agent the tapes that he had stepped out of the room while the recorder was still on. The terrorism case agent told the OIG that when the informant told the agent about leaving the recording in the room, the agent informed a supervisor who instructed the agent to admonish the informant not to do it again, which the agent said was done. The Orlando case file shows no documentation of the terrorism case agent's actions. The informant told the OIG that he did not recall telling the case agent about leaving the room with the recorder on and that he did not recall being admonished by the case agent later.

them any further. At this point, a partial transcript of the recording had been prepared and had been disseminated to the investigative team. When interviewed by the OIG, the prosecutor had no specific recollection of this incident, but said that if faced with this situation she would have provided the advice that the agent related to the OIG.

In reviewing the case file, the OIG also found that the terrorism case agent had not checked basic indices on any of the subjects. According to an FBI manager in Tampa we consulted, checking indices is a basic investigative step that agents routinely employ at the outset of an investigation. We determined that such a check would have shown in the early stages of the terrorism investigation that one of the subjects in the terrorism case was also the main subject of an ongoing drug investigation in the same office. According to German's September 2002 letter, it was not until a casual conversation in March 2002 between German and the case agent for the drug investigation that agents realized that the same subject had been identified in both the terrorism case and the drug investigation. In April 2002, at the suggestion of FBI Headquarters, the Orlando RA folded the terrorism investigation into the drug case and assigned the case agent for the drug investigation as the lead agent, although the terrorism case agent continued to work on the matter.

The OIG also reviewed German's allegation that the Tampa Division had not responded to a request from CTD to address investigative leads in the case. We determined that the Tampa Division received the request from CTD in an EC dated June 26, 2002. The EC assigned the Tampa Division five leads to investigate and set a deadline of August 26, 2002. German alleged in his September 10, 2002, letter that the Tampa Division had not yet responded to the EC. Our review of the file disclosed that the Tampa Division investigated the leads and reported back to CTD on the steps the Division had taken in an EC dated September 25, 2002.

In sum, we concluded that that the Orlando terrorism case was not properly investigated or documented by the Orlando case agent. The case agent failed to take necessary investigative steps in a timely manner, including reviewing and documenting important meetings between the informant and subjects. As a result of the case agent's investigative failures, the Tampa Division did not have timely information concerning: (a) meetings between the informant and the subjects which, when examined by Tampa managers, led them to the conclusion that no terrorism nexus existed in the case; (b) the fact that one of the subjects of the terrorism investigation was also the main subject of a separate drug investigation in the same office ; and (c) the fact that the informant

may have violated the law governing the recording of conversations between individuals without the consent of one of the parties.

2. Allegation that Supervisors in the Tampa Division Mismanaged the Investigation

German alleged that he brought to the attention of two Orlando RA supervisors the problems with the lack of case documentation and the recording violation, but that no action was taken against the case agent. German stated in his September 2002 letter that both supervisors expressed frustration over the performance of the case agent and that one supervisor mentioned the desire to forgo documenting any previous meetings and simply document the case from that point forward.

German believed that the failure of the supervisors to effectively oversee the Orlando investigation caused the FBI to allow a credible terrorism conspiracy to go unaddressed. He believed the supervisors should be held accountable for their actions through a formal FBI investigation. German complained that the FBI protected the supervisors from scrutiny, promoting one of the supervisors within a few months of German's letter.

The OIG determined that managers in the Orlando RA and the Tampa Division were well aware of the problems with the case agent before German sent his letter. Many of the employees we interviewed in the Orlando RA recalled that supervisors and agents were frustrated with the difficulties created by the case agent's investigative deficiencies in the Orlando terrorism investigation and other cases. Several witnesses described supervisors giving the case agent direct orders, sometimes in a heated manner, to complete the overdue paperwork in the Orlando case. However, we found that the case agent's supervisors took no immediate action, such as imposing a performance improvement or developmental plan or disciplining the agent.

The December 2002 EC from the Tampa Division summarizing the findings of its review (described in detail in subsection B.1., below) stated that appropriate measures would be taken to address the case agent's performance deficiencies. However, no action was taken at the time. Even after the Inspection Division recommended imposing a developmental plan for the case agent in the Division's November 2003 report on the Orlando case (described in detail in subsection B.2., below), the Orlando RA waited until February 2004 to impose a 4-sentence "Development Plan" on the case agent.

We also determined that when the terrorism case was folded into the drug investigation in April 2002, the Orlando RA gave the drug

investigation case agent primary responsibility for the entire investigation, but allowed the terrorism case agent to continue to work on the case. The OIG found no further investigative deficiencies in the case under the new case agent.

The OIG interviewed the supervisor who German alleged had mentioned the desire to forgo documenting past investigative actions and simply document the case from that time forward. The supervisor told the OIG that any conversation that he might have had with German about documenting past activity would have been to emphasize that the terrorism case had failed to materialize and that the case should move forward as a drug investigation. He stated that after German's letter was sent to the Tampa Division, however, the Tampa SAC instructed the Orlando RA to review and transcribe all the past recordings of meetings between the informant and subjects.

The OIG concluded that by failing to effectively address investigative deficiencies in the case in a timely manner, even after German brought these problems to the Orlando RA supervisors' attention through calls and e-mails in the summer of 2002, the supervisors' inaction allowed the problems to continue and precipitated German's September 2002 letter.

3. Allegation that a Viable Terrorism Case was Missed

German believed that the deficiencies in the investigation and the mismanagement resulted in the FBI failing to act on an opportunity to launch an effective undercover operation against what he believed was a credible terrorism threat. German specifically alleged in his September 2002 letter that at the January 2002 meeting one of the subjects admitted he financially supported several international terrorist groups and requested assistance in transferring money to these terrorist groups. In an e-mail message German wrote to the CTD Deputy Assistant Director three weeks after his September 2002 letter, German stated that delays in the case would "allow this subject to continue his support of terrorist groups unfettered." In reaching his conclusion that a viable terrorism case had been missed, German referred to a partial transcript of the January 2002 meeting and to results of a search that German conducted of an FBI case database for entries on one of the subjects in the terrorism investigation.

In assessing German's allegation of a missed terrorism case, the OIG examined the Orlando case file (including communications from DTOU, the partial transcript and the full recording of the January 2002 meeting, and recordings of a later meeting and several conversations between the informant and one of the subjects), the Tampa Division

review, and the Inspection Division review. The two FBI reviews are described in greater detail in subsection B, below. Both reviews included FBI agents experienced in terrorism cases.

From the Orlando case file, the OIG found that in April 2002, DTOU, which is part of CTD, notified the Tampa Division by e-mail that DTOU declined to support the Orlando RA's terrorism undercover proposal because officials at DTOU, in consultation with the FBI's National Security Law Branch and the Undercover and Sensitive Operations Unit, determined that the UCO appeared to be primarily drug-related and not domestic terrorism-related. The DTOU repeated this conclusion in an EC in June 2002, which was reviewed by the relevant international terrorism unit of the FBI. The e-mail and the EC from DTOU also noted that the international terrorism unit did not find any international terrorism investigations involving one of the subjects in the Orlando case.

In evaluating the review by the Tampa Division, the OIG found that after the Tampa Division reviewed the recordings of the January 2002 meeting and a subsequent meeting as well as several conversations involving the informant and one of the subjects, the Tampa Division concluded that there was an insufficient terrorism nexus between the two subjects and therefore a viable terrorism case had not been missed. The basis for the conclusion was that the subjects had not discussed involvement in terrorism activities in their one meeting in January 2002. Moreover, contrary to what the informant had alleged, the subjects had not discussed money laundering or weapons sales.

The Tampa Division also reviewed the recording of a later meeting between the informant and one of the subjects and recordings of conversations between the informant and the subject. According to the Tampa Division, these recordings showed that the informant was pressing one of the subjects to engage in money laundering, while the subject adamantly declined to engage in illegal conduct.

In evaluating the review by the Inspection Division, the OIG found that the Inspection Division examined the partial transcript of the January 2002 meeting and the results of the database search by German before concluding that no viable terrorism case had been missed.

In addition, as part of this review the OIG listened to the recording of the January 2002 meeting and did not hear any discussion by the subjects about engaging in terrorist activities, money laundering, or weapons sales. In neither the recording of the January meeting nor the partial transcript of the meeting did the OIG find the conversation

identified by German in his September 2002 letter about sending money overseas to support terrorist groups.

When we listened to recordings of a later meeting and of conversations between the informant and one of the subjects, we likewise did not find that the subject discussed plans to engage in any terrorist activities. In fact, at the later meeting between the informant and one of the subjects less than a month after the January 2002 meeting, the subject repeatedly told the informant that he did not want to engage in money laundering or any other illegal activity. This subject also stated he did not perceive that the other subject who attended the January 2002 meeting had made any overtures to engage in money laundering, nor did the other subject state that he financially supported or wanted to send money to any terrorist groups abroad.

In sum, the OIG investigation of German's allegation of a missed terrorism case, including an examination of the recordings involving the subjects and the two FBI reviews, we did not find sufficient evidence to undermine the conclusions of the reviews that a viable terrorism case had not been missed.

B. Alleged Inadequate Response to German's Complaint

As noted above, in response to German's September 2002 letter the FBI conducted several reviews of the Orlando case, including reviews by the Tampa Division and the Inspection Division. German complained in his OIG interviews and in letters to the FBI that the FBI failed to respond adequately to his complaints and conducted overly narrow reviews without investigating his allegations of misconduct by agents and supervisors.

OPR also conducted two interviews of German after receiving his complaints. German complained that following his two OPR interviews OPR failed to investigate the allegations of misconduct involving the Orlando terrorism case agent and Tampa Division supervisors. We examine each of these issues in turn.

1. Alleged Inadequate Response by the Tampa Division

a. Tampa Division's Review of Orlando Case

German alleged that the Tampa Division did not take his complaints seriously, conducted an overly narrow review of his complaints, and failed to hold the case agent and the Orlando supervisors accountable for the mishandling and mismanagement of the Orlando terrorism case.

The OIG found that the FBI responded within days to German's September 2002 letter, which he submitted through his chain of command in the Atlanta Division. Copies of the letter were sent from the Atlanta Division to officials in the Tampa Division and the CTD at FBI Headquarters. In addition, the Atlanta ASAC called the SAC for the Tampa Division and sent an e-mail message to the Deputy Assistant Director of CTD to let both know the letter was on its way.

After receiving the complaint from both German and CTD, the Tampa Division immediately initiated a review of the Orlando case. The Tampa Division SAC assigned an ASAC to oversee an internal evaluation of the information in the Orlando investigation, including a review of all recordings in the case.[4] The team conducting the internal evaluation included counterterrorism specialists in the Tampa Division.

The OIG also reviewed an e-mail message from the Tampa Division ASAC to FBI Headquarters written the week following German's letter. The e-mail acknowledged the seriousness of German's complaint and promised quick action to determine whether investigative lapses had occurred. The e-mail also described the objective of the review as an effort to identify and investigate any criminal or terrorist associations that might be found. In addition, the message stated that the Division's supervisory experts for international terrorism and domestic terrorism were involved in assessing the case. The e-mail explained that based on an earlier suggestion by FBI Headquarters, the terrorism case had been consolidated into an existing parallel drug investigation on the same primary subject in the Orlando RA.

The e-mail message stated that one of the subjects in the case had long been known to the Tampa Division as a "common criminal," but denied there had ever been any indication that he was a terrorist threat to the United States. The message further referenced supervisory problems and understaffing in the Orlando RA, as well as the disappointing performance of the initial case agent.

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[4] At the same time the Tampa Division was conducting a review of German's allegations, CTD also summarized what actions it had taken relating to the Orlando case. The OIG reviewed an EC from CTD to the Tampa Division, dated October 15, 2002, in which CTD summarized its actions in the Orlando case and recommended that the Tampa Division SAC review German's allegations "to determine if any performance deficiencies and/or misconduct issues are present." A CTD supervisor told the OIG that the EC represented an effort to document all the information it had on the Orlando investigation for the benefit of any reviewers.

The e-mail closed with an assurance from the Tampa Division that despite delays in the case, the related drug investigation was "back on track" and was now receiving the full resources of the Tampa Division.

At the outset of the Tampa review, the SAC of the Tampa Division held a meeting with his management team, including the Senior Supervisory Resident Agent (SSRA) from the Orlando RA. According to the SSRA, the SAC directed the Orlando RA to review all the recordings and other evidence in the Orlando investigation "to see if we missed something."

The SSRA also told the OIG that the SAC directed him to notify German's supervisor in the Atlanta Division that Tampa Division personnel would not be contacting German while the review was under way to avoid unproductive disputes between German and the Tampa Division on how the Orlando investigation should be run. In addition, the SSRA stated that the response initially mapped out by Tampa Division management included inviting German to a post-review briefing, but such a briefing never occurred because of friction between German and the Tampa Division, according to Tampa Division officials.

Within a few days of the meeting with the SAC, the SSRA called a meeting in the Orlando RA and directed all available agents to take part in a review of all recordings made in the case and to produce summaries. These summaries, along with a review of other material and interviews with the informant, were documented in two reports produced by the Orlando RA and sent to Tampa Division managers and CTD.

On December 3, 2002, the Tampa Division responded to FBI Headquarters with an EC that documented Tampa Division's completed review of all recordings in the Orlando case. The EC concluded that it was the informant "driving the relationship" between the subjects and that the recordings did not support the informant's claims of a terrorism link. The EC reiterated Tampa Division's position that one of the subjects in the case was a common criminal rather than a terrorist threat. The EC stated that the review found that "at no time did [the subjects] speak of terrorism."

Regarding German's allegations that the case agent had failed to document important meetings between the informant and the subjects, the EC stated that "[German's] statement that these meetings had yet to be documented via FD-302 or consensually recorded conversations transcribed, is accurate." The EC characterized the case agent's investigative and administrative efforts as inadequate, but it described the lapses as performance issues not constituting misconduct. The EC indicated that appropriate measures would be taken to address the case

agent's inadequate performance. The EC, however, did not address any shortcomings of supervisors or managers other than to point out that one supervisor involved early in the case had become a "moot point" because he had since retired.

b. OIG Analysis

The OIG concluded that the Tampa Division responded in a timely manner to German's September 2002 letter by initiating a review to examine whether a legitimate investigative opportunity was missed. By quickly reviewing and evaluating the recordings of the meetings between the informant and subjects, the Tampa Division made an effort to determine whether the subjects were involved in a terrorism conspiracy and appeared to have taken seriously German's allegations of a missed terrorist threat.

In our review of the recordings of the meetings between the informant and the subjects, we did not find sufficient evidence to question the Tampa Division's conclusion that no terrorist threat was missed. Like the Tampa Division, we did not hear in the recording of the January 2002 meeting any reference by the subjects to plans to engage in terrorist activities, money laundering, or weapons sales.

Other than acknowledging the investigative deficiencies of the case agent and characterizing the lapses as performance issues, the Tampa Division did not undertake a thorough investigation into German's allegations about the actions and inactions of individual agents and supervisors in the Tampa Division and the impact of their conduct on the Orlando case. In April 2002, when the terrorism case was folded into the drug investigation, the case agent for the drug investigation took over responsibility for both matters, although the terrorism case agent continued to work on the combined investigation. While the EC stated that appropriate measures would be taken against the terrorism case agent, no specific measures were implemented until February 2004, when the Orlando RA imposed a developmental plan on the case agent three months after the Inspection Division recommended that such a plan be imposed.

2. Alleged Inadequate Response by the Inspection Division

German also alleged that a subsequent review by the Inspection Division similarly failed to address deficiencies by the terrorism case agent and managers in the Tampa Division.

a. The Inspection Division Review

German told OIG investigators that by February 2003 he had become increasingly frustrated that his allegations were not being sufficiently addressed and believed that time still existed for a successful UCO to be launched in the Orlando case. On February 3, 2003, he sent an e-mail message to the FBI Director. The message was captioned "National Security Matter" and read, in pertinent part:

> I believe this matter requires your personal attention, inasmuch as it involves a significant national security threat, which is not being addressed, and serious misconduct by Bureau officials. This was reported to the DAD, Counterterrorism Division, on Sept. 12, 2002, and to OPR on October 15, 2002, yet appropriate action has not been taken. I fear that continued failure to address this matter properly may result in harm to U.S. interests here and abroad, and great embarrassment to the Bureau.

The e-mail message contained electronic copies of German's September 2002 letter and the EC he prepared for CTD, dated December 19, 2002.

The OIG investigation determined that German's e-mail resulted in a meeting between the FBI Deputy Director and the Assistant Directors of OPR and the Inspection Division. It was decided at the meeting that an Inspection Division performance review would be conducted into the Orlando terrorism case. According to the FBI, the primary objective of a performance review by the Inspection Division is to assess the overall effectiveness of an FBI field office, as distinguished from individual accountability for misconduct, which normally would be investigated by OPR.[5]

The Chief Inspector from the Inspection Division selected a team of three managers to conduct an on-site review in the Tampa Division. The team was led by an ASAC from another field office and included two Supervisory Special Agents (SSA), one from CTD and one from the Inspection Division. The SSA from CTD had specific experience with terrorism matters.

The team spent the week of March 3, 2003, in the Tampa Division conducting an on-site performance review. The Inspection Division's

[5] In 2004, as a result of FBI restructuring, the investigative functions of OPR were assigned to the Inspection Division. OPR retained its adjudicative function. This restructuring occurred subsequent to the reviews that were conducted in this matter.

final report, portions of which were classified "secret" by the Inspection Division, was issued in November 2003.

The team leader told the OIG that the Chief Inspector told him that there was an allegation in a case in Orlando and requested him to lead a team to "take a look at the whole thing." The Chief Inspector faxed two documents to the team leader: German's September 2002 letter and his December 2002 EC to CTD.

The Inspection team met together on the first day of the review and identified the following two investigative objectives:

1. Did the Tampa Division appropriately address and investigate allegations involving possible terrorist activities of the subjects in the Orlando case?

2. Was the informant appropriately operated by Tampa investigative personnel and sufficiently monitored by Tampa's supervisory personnel?

The team leader explained to the OIG that the focus of the review was to look at the overall performance of the Tampa Division regarding the Orlando case, not on specific personnel or misconduct matters that would fall under the purview of OPR. The Inspection team interviewed several agents and supervisors involved in the Orlando terrorism case.

During the on-site review, the team leader said he telephoned German as a courtesy to let him know the review was under way. The team leader told the OIG that German appeared to be perturbed that he was not interviewed at the outset of the review. The team leader also said that German appeared to be frustrated that the team did not have his two OPR affidavits. After several calls between German, OPR, and the team leader, OPR faxed German's affidavits to the team.

Unsatisfied with an interview by telephone, German stated that he traveled the following week to meet with the team leader and one of the team leader's assistants. While German told the OIG that he was able to relate all of his concerns in person to members of the Inspection team, he still believed that the review remained inappropriately limited to performance issues and did not delve into misconduct matters that he had alleged.

In its November 2003 report, the Inspection Division reached essentially the same conclusion as the Tampa Division, namely that the informant in the Orlando terrorism case had overstated the substance of what was discussed at the meetings with subjects. The Inspection team

found that had recordings from those meetings been reviewed in a timely manner, the informant's embellishments would have been detected and investigative activity would have been redirected away from the terrorism angle. The Inspection Division review also identified two leads not directly related to the Orlando terrorism investigation that the Tampa Division had not investigated fully. In addition, the report addressed the associations that German had identified in his September 2002 letter from FBI database searches that he said demonstrated connections between one of the subjects and extremist groups.

Like the Tampa Division review, the Inspection team determined that the Orlando case agent had not performed adequately and that the Tampa Division had not handled the informant according to the FBI manual of investigative guidelines. The Inspection Division recommended that a developmental plan be imposed on the Orlando case agent.

Regarding German's allegations against supervisors, the Inspection Division report also noted that "supervisory personnel failed to clearly delineate the responsibilities" of agents in the case and "failed to recognize the ineffective performance of the [informant] and the [case agent's] operation of him." The report further noted that supervisors "failed to take decisive corrective action to remedy these inefficiencies." However, the report made no recommendations regarding the conduct of Tampa Division supervisors or managers.

b. OIG Analysis

Based on our review, the OIG concluded that the Inspection Division review was thorough in meeting its first objective, which was to determine whether the Tampa Division had appropriately addressed allegations involving possible terrorist activities in the Orlando case. In making its determination, the team – which included a counterterrorism expert – reviewed the transcripts of meetings involving the subjects and also reviewed the results of German's FBI database search of one of the subjects.

With respect to the second objective, the Inspection team reviewed whether the informant was properly operated by the case agent and whether the case agent was properly monitored by the agent's supervisors. However, the review did not make any recommendations concerning its observation that supervisors had failed to manage the case agent sufficiently. In addition, the Inspection Division did not investigate German's allegations of misconduct on the part of the case agent or Tampa Division supervisors.

In OIG interviews, the team leader and the Chief Inspector of the Inspection Division said they understood that German's allegations of misconduct had already been evaluated by OPR before the Inspection Division review began. However, OPR officials told the OIG they understood that any misconduct matters discovered during the Inspection team's review would be passed back to OPR for investigation. The OIG was unable to find any written documentation to support either group's understanding.

3. OPR Allegedly Failed to Open an Investigation into Misconduct

German complained to the OIG that despite being interviewed twice by OPR about his complaints of misconduct on the part of agents and supervisors in the Tampa Division, OPR never opened an investigation. German's OPR interviews occurred in December 2002 and February 2003.

a. December 2002 OPR Interview

German told the OIG that he anticipated that his September 2002 letter would result in an investigation likely conducted by OPR. Shortly after sending the letter, he said that he began calling OPR, but he never received any information about whether an investigation had been initiated. After several weeks of failed attempts to receive any information about the status of his complaints, German said he contacted the OIG and expressed his frustration over not receiving any feedback from the FBI. In response, an OIG supervisor encouraged OPR to interview German about his complaints. The interview took place over a 2-day period in December 2002 with an OIG supervisor present.

At the interview, the OPR investigator explained to German that an affidavit needed to be executed laying out all of his allegations. The OPR investigator declined German's request to simply incorporate his September 2002 letter into the affidavit, and the investigator prepared the affidavit, in part, by taking significant excerpts from the letter.

In addition to repeating the allegations from his September 2002 letter, German also noted that several reports from the case were only recently uploaded into the FBI case database even though they were dated several months earlier. He stated that the substance of these new reports also contradicted earlier reports in the case. German told the OIG that he believed that OPR would open an investigation into the improper dating of the reports because of the seriousness of the misconduct. However, OPR did not open an investigation into German's allegation that reports were backdated.

After the interview, German and the OIG representative met with managers from CTD to whom German expressed his concerns that the FBI had missed an opportunity to move forward on a legitimate terrorism investigation. CTD managers asked German to prepare a report for them detailing the associations he had discovered in the FBI database regarding the primary subject in the Orlando investigation, and they promised that action would be taken regarding his concerns. German subsequently forwarded an EC dated December 19, 2002, to these CTD managers. However, the OIG found no indication that German's EC was acted on until the Inspection Division review was ordered in February 2003. We asked one of the CTD managers whether any action was taken on German's EC, and he said he was not aware of any.

b. February 2003 OPR Interview

As noted above, on December 3, 2002, the Tampa Division sent an EC to FBI Headquarters responding to German's September 2002 letter. After reading the Tampa Division's EC, German requested a second OPR interview. In German's February 2003 OPR interview, he stated that the Tampa Division EC contained a number of serious misrepresentations which he believed warranted an OPR investigation. However, OPR did not open an investigation into German's allegations of false statements in the EC.

This second interview was conducted over three days by an OPR investigator with an OIG investigator in attendance. As in the first interview, the OPR investigator had German prepare an affidavit, this time to identify the precise assertions German believed were false in the Tampa EC and to explain the reasons he believed them to be inaccurate. German signed an 11-page statement alleging that eight assertions in Tampa Division's EC were false, including that the key meeting between the informant and the two subjects of the Orlando terrorism investigation had not been recorded. He also detailed four more allegedly false and misleading statements in two other Tampa Division documents and an EC from CTD.

However, on February 11, 2003, the same day that German alleged in his OPR interview that the Tampa Division EC had misrepresented that the meeting between the informant and subjects had not been recorded, the Tampa Division issued an EC clarifying its previous EC from December 2002 about the meeting and indicating that the meeting had indeed been recorded.

This 4-page February 2003 EC, drafted by the Tampa Division ASAC, stated that its purpose was to provide clarification and prevent the

mischaracterization of events in the Orlando investigation. In addition to explaining that the meeting between the informant and the subjects had been recorded, the EC described the violation governing undercover recordings that occurred when the informant left the room and the recorder captured the subjects' conversations. The February EC stressed that the informant had been briefed at the beginning of the case on proper procedures and that the violation had been properly handled by advising a federal prosecutor of the violation and following her advice. The EC ended by challenging German's motivation for bringing his allegations.

German later alleged to the OIG that someone in OPR must have notified Tampa Division management immediately after he raised his allegation of the false statement in the first Tampa Division EC during his February 2003 OPR interview, because the Tampa Division's clarifying EC was issued the day after he had told OPR about the alleged false statement in the Tampa Division's December 2002 EC. When the OIG asked the Unit Chief of OPR about the timing of Tampa's clarifying February EC, he said that he talked with Tampa Division managers several times about many aspects of German's allegations. While the Unit Chief said he did not specifically recall any particular call to discuss German's claim of a false statement in Tampa's first EC, he said any such call would have been made to gather more information and not to alert the Tampa Division that German had challenged the accuracy of its EC.

In his OIG interview, the Tampa ASAC who authored the clarifying February EC stated that he did not recall how the assignment for drafting this EC was given to him or whether he was told by anyone that German had alleged that the Division's December 2002 EC was inaccurate.

c. OIG Analysis

In February 2005, OPR officials told the OIG that they did not open an investigation or make a referral of the misconduct allegations raised in German's two interviews because they thought that the Inspection Division review was planning to address those allegations. Instead, OPR officials told us that they held all the material from the interviews until April 2003, when OPR decided to administratively close the matter in light of the Inspection Division's March 2003 review. The OPR officials told us that they determined an Inspection Division review was the most appropriate response to German's allegations based on the totality of the allegations and the stated objectives of the review. The OPR officials also stated that they understood that the Inspection team would be on the alert for misconduct issues to report back to OPR.

However, as noted above the Inspection team sent to Tampa did not share this same understanding. In the OIG's view, German's allegations that Tampa officials backdated records and falsified an EC should have been investigated by OPR. In addition, OPR should have examined the circumstances surrounding the "clarifying" EC from the Tampa Division issued at the same time that German had alleged that the earlier Tampa Division EC was false by representing that the key meeting between the informant and the subjects had not been recorded when it actually had.

4. Summary of OIG Findings on Alleged Inadequate Response to German's Complaint

The Tampa Division responded to German's complaint by assembling a review team composed of agents with counterterrorism experience. Among other things, the agents on the team listened to the recordings involving the subjects to determine if a terrorism nexus had been missed. The review team found investigative deficiencies by the terrorism case agent but concluded that a viable terrorism case had not been missed. However, we found that the Tampa Division did not thoroughly investigate German's allegations of mismanagement by supervisors and did not take timely steps to address the case agent's investigative deficiencies.

The FBI Inspection Division subsequently formed an Inspection team, composed of managers who also had counterterrorism experience, to review German's complaint. German met with the Inspection team and provided the team with information relating to his complaint. The Inspection team reviewed the partial transcript of the January 2002 meeting and the results of the indices check that German had prepared on one of the subjects. The team concluded that there was no nexus to terrorism and that a viable terrorism investigation had not been missed. In addition, the team determined that Tampa Division managers had failed to take decisive action in relation to the investigative deficiencies of the case agent. However, the Inspection team did not look into German's complaint related to misconduct allegations against the case agent and Tampa management.

Likewise, OPR did not investigate the misconduct allegations that German raised in his February 2003 OPR interview. Instead, OPR assumed that the Inspection Division would refer back to OPR any allegations of misconduct uncovered during the Inspection Division review. However, the Inspection Division assumed that the misconduct issues already had been addressed by OPR. Consequently, German's misconduct allegations were not investigated fully until the OIG initiated this review.

C. Alleged Cover-Up by the Tampa Division

German alleged that the case agents and managers in the Orlando RA tried to cover up their responsibility for the problems and delays in the Orlando case by backdating records and making false statements in response to queries from FBI Headquarters. After reviewing German's allegations, the OIG identified four issues relating to an alleged cover-up that warranted investigation. None of these issues had been investigated by FBI OPR.

1. Reports Allegedly were Backdated

German alleged in his OPR interview and later to the OIG that reports in the Orlando investigation had been backdated. German specifically stated that in the weeks after his September 2002 letter, the Tampa Division entered several investigative reports into the FBI case database with dates purporting to show that the reports were prepared months earlier.

The OIG investigated these allegations by reviewing the Orlando terrorism case file and interviewing the agents and supervisors in the Tampa Division. As discussed in section IV. A.1., above, we found that 21 of the case agent's 40 FD-302s investigative summaries were entered into the FBI database during a 3-week period after German sent his September 2002 letter. These reports covered investigative activities that had occurred as far back as January 2002, nearly 10 months earlier. According to FBI policy, agents generally should document their investigative activities within five days.

The form that the FBI uses for FD-302s does not have a field for the date that the FD-302 was created, prepared, or completed. Instead, the FD-302 has two fields for the dates on which the report was "dictated" and "transcribed," although both fields have become obsolete as agents now routinely draft their own reports. The FBI case database, however, still shows dates for these two fields, and the dates are assigned by the reporting agent. When printed from the FBI case database, the FD-302 shows these dates without identifying their meaning and in a fashion that would give the reader an impression that the dates represent when the reports were drafted. Supervisors we spoke with indicated that there is no FBI policy on how these fields should be completed by agents.

By manipulating the dates of dictation and transcription, a reporting agent can create the impression for users of the FBI case database that a particular FD-302 was written close in time to the

activity it reports and therefore was fresh in the mind of the agent, when in fact that may not be true.

For example, the Orlando terrorism case agent's FD-302 on the meeting between the informant and subjects in January 2002, listed the date of dictation as January 25, 2002, and the date of transcription as March 16, 2002. However, the FBI case database, which automatically assigns the date that the report is entered into the system, contains an entry date for the FD-302 of September 23, 2002, which was more than 200 days after the meeting took place. The entry date also was less than two weeks after German's letter was sent to the Tampa Division complaining about the lack of documentation of the informant meetings.

The OIG determined that all 21 of the case agent's FD-302s entered into the database after German's September 2002 letter included dictation dates prior to the letter, often significantly earlier dates. Furthermore, we observed that the dates of dictation entered by the case agent on many of the FD-302s did not correspond to any other investigative or administrative events in the case and often differed from the date of transcription by weeks or months.

When we questioned the case agent about the significant time gaps between the dates of dictation for the FD-302s and their entry date into the database, the case agent admitted that many reports were not completed until after German sent his letter, although the case agent denied falsifying any dates or intending to deceive anyone. As an explanation for the time lapses, the case agent cited a large volume of work and multiple FD-302s to write, as well as an administrative backlog in the office and the fact that certain unspecified reports were lost and had to be resubmitted. The case agent said that the most critical matters always were documented in a timely fashion, but that less critical reports sometimes took longer. The case agent did not provide an explanation for the 8-month delay in documenting the January 2002 meeting or for the significant discrepancy between the dates of dictation and the dates when the 302s were entered into the FBI database.

The OIG noted, however, that FD-302s written by other agents in the Tampa Division were entered into the FBI database in a much more timely fashion, averaging 18 days from the date of the activity reported, while the entry dates for the case agent's FD-302s averaged 149 days.

We concluded that the case agent assigned inaccurate dates to the dictation and transcription fields of many of the FD-302s to give the impression that they were completed much earlier than they actually were. The OIG recommends that OPR Adjudications review the case agent's conduct in this matter and take appropriate action.

2. Tampa Division's EC Allegedly Contained False Statements

a. December 2002 EC

German alleged that the Tampa Division lied in an EC sent to FBI Headquarters in December 2002 setting forth the Division's response to German's September 2002 letter. Specifically, German alleged that the Tampa Division falsely asserted in the EC that a key meeting between the informant and subjects had not been recorded, when in fact it had been. German discussed this allegation in his second interview with OPR in February 2003, stating that he knew for certain the meeting had been recorded and producing for OPR investigators a partial transcript of the recording.

The Tampa Division's December 2002 EC stressed that the predication for the terrorism case was overstated from the beginning by an informant who embellished oral accounts of his meetings with the subjects. We found that most of these meetings were recorded but not listened to by agents as they should have been. The December 2002 EC stated that the key meeting, which occurred in January 2002, was not recorded and explained that the informant had left the recorder in the car when he went to meet with a subject.

The Tampa Division ASAC who drafted the December EC told the OIG that he relied on documents in the case file to create the EC. With regard to the key meeting between the informant and subjects, the ASAC said he utilized two summaries of the meeting, both prepared by the case agent, from which he understood that the informant inadvertently failed to take a recording device to the meeting and that the account of the meeting was based on a verbal debriefing of the informant afterwards.

In its review of the file, the OIG found the two summaries that the ASAC cited as source documents for the assertion that the meeting was not recorded. We found the documents confusing and unclear as to whether the meeting was recorded.

The ASAC further explained to the OIG that although he could not recall how he became aware that the accuracy of his December EC had been challenged, he resolved the discrepancy as to whether the meeting was recorded through coordination with the SSRA in the Orlando RA who told the ASAC that the meeting was recorded. He subsequently prepared the second EC in February 2003 to clarify the issue.

The ASAC's February 2003 clarifying EC, a 4-page report, acknowledged that the meeting was, in fact, recorded. It explained that at one point during the meeting the informant left the recording device in a room with subjects while the informant stepped outside, a violation of FBI procedure. The report went on to explain that prior to the meeting the informant had been advised of the proper procedure for recording conversations. The report also contained copies of three FBI forms that the informant had signed acknowledging he understood these rules.

b. Attachments to the February 2003 EC

German did not raise any allegations concerning the substance of the clarifying February 2003 EC from the Tampa Division. However, the OIG noticed discrepancies regarding dates during its review of the three FBI forms attached to the EC, and we therefore included this issue as part of our investigation.

The three FBI forms attached to the EC involved the informant's key meeting with the subjects. The forms – FD-472, FD-473, and FD-473a – constitute the standard agreements between the FBI and a prospective informant. FD-472 documented the informant's consent for the FBI to install a telephone recording device and another device to trace calls. The FD-473 documented the informant's consent to wear a body recorder or transmitter, and the FD-473a was the consent form for closed circuit video monitoring. Each of the forms required the signatures of the informant and two witnesses, usually Special Agents. The OIG noted that both the FD-472 and FD-473 contain an identical admonishment as follows:

> I understand that I must be a party to any conversation in order to record that conversation. I therefore agree not to leave the recording equipment unattended or take any action which is likely to result in the recording of conversations to which I am not a party.

The intent of this admonishment is to emphasize to an informant the obligation to record only conversations to which the informant is a consenting party. An informant who leaves a recording device in a room in which he is no longer present removes the element of consensual monitoring. This type of monitoring requires special authorization, including approval by a federal judge, under Title III of the Electronic Communications Privacy Act of 1986 (Title III).

When the OIG reviewed the copies of the three FBI forms, we noticed that the handwritten dates appeared inconsistent with

handwriting elsewhere on the forms. We therefore obtained the original forms from the case file and determined that the dates on the documents had been altered using correction fluid. Forensic analysis disclosed the documents originally were dated March 1, 2002, and had been altered to show January 9, 2002. The alteration was significant because the meeting between the informant and the subjects at issue in the February EC was held later in January 2002. Therefore, the dates on the documents were altered from a date after the meeting to a date before it. Without the alteration, the forms would not support the February EC claims that the informant had been properly advised not to commit a recording violation.

The OIG extensively investigated the alteration of these official documents in an attempt to identify who altered them. We interviewed the informant and agents, supervisors, managers, and clerical staff throughout the Tampa Division. We also used forensic chemical, ink, and handwriting analysis on the forms to determine the original dates and whether any signatures on the forms had been forged. As mentioned above, we determined that the original date on the forms was March 1, 2002. The handwriting examinations were inconclusive. In addition, we administered polygraph examinations to the case agent and the Orlando SSRA. Both denied altering the forms and were found to be non-deceptive in their examinations.

We were unable to identify who altered the dates on the forms, and we did not find sufficient evidence to hold any individual responsible for the alterations. However, based on the forensic evidence, it is clear that someone altered the three forms to make it appear as though the instructions to the informant, including the admonishment about not leaving the recorder alone, were given before the critical January 2002 meeting, when in fact the original date on the forms indicated that the forms were completed more than a month after the January meeting.

3. Tampa Allegedly Failed to Address a Violation of Law

German also alleged that, as discussed in the previous subsection, the Tampa Division did not respond to a violation of Title III that occurred when the informant left the recording device in the room with the subjects while he used the restroom. German learned during a conversation with the informant in August 2002 that a violation had occurred during an undercover meeting in January 2002. German passed the information to an agent in the Orlando RA and expected the matter to be addressed immediately, although he said that he never heard anything further.

The OIG interviewed Tampa Division agents and supervisors, officials from the U.S. Attorney's Office and the informant about this issue. The OIG found that the recording of the meeting was not reviewed by the original case agent until after the Tampa Division had received German's September 2002 letter. However, when German learned about the potential violation from the informant in August 2002, German passed the information to the Orlando case agent handling the drug investigation, this agent notified a supervisor and also contacted an Assistant U.S. Attorney (AUSA) overseeing the case. We reviewed an EC from the Tampa Division that indicated that the drug investigation case agent consulted with the AUSA who told the agent to isolate the recording from the rest of the case materials and give it to an FBI supervisor for safekeeping. The AUSA further instructed the case agent that the recording should not be listened to further or used in the case. According to the drug case agent and a Tampa Division EC dated February 11, 2003, the recording was turned over to the Orlando SSRA and was not used by agents in the investigation. German, however, was never informed of the resolution of this matter.

The OIG interviewed the AUSA named in the EC. While she did not have specific recollection of the incident, she said that the response documented in the EC is precisely what she had advised other agents in similar instances.

The OIG concluded that the drug case agent took appropriate action when informed of the Title III violation by German. He informed his supervisors and the AUSA involved in the investigation. He also provided the recording to his supervisor for segregation. According to the AUSA, this was the appropriate course of action. The OIG contacted two officials in the Criminal Division's Office of Enforcement Operations, which has oversight responsibility for Title III authorizations, and the two officials confirmed that the actions of the drug case agent were appropriate. These officials noted that only the portion of the recording where the informant left the room needed to be segregated and not used in the investigation.

4. Tampa Division Allegedly Made False Statements to FBI Headquarters

German believed that the Tampa Division made false statements to CTD twice when CTD asked the Tampa Division in 2002 whether the Orlando case had an active terrorism nexus. German alleged that the false statements were documented in an EC from CTD dated October 15, 2002, which summarized CTD's interaction with the Tampa Division on the Orlando case.

The October 2002 EC, drafted by a CTD analyst, recounted an e-mail message in May 2002 from CTD to the Tampa Division asking if it was aware of international figures associating with domestic terrorism subjects. The e-mail message provided the name of the primary subject in the Orlando investigation. The Tampa Division replied to the CTD e-mail four days later that it had no positive intelligence to report and promised to notify CTD if it discovered contact with the subject in the future. German alleged that this response was false on the part of managers in the Orlando RA because German believed the subject named in the CTD e-mail was, in fact, connected to terrorism and that the Tampa Division management knew about the connection.

The CTD EC also noted a July 2002 visit to the Orlando RA by a CTD supervisor who specifically asked about the investigation and was told that the matter was a "pure drug investigation." German believed this response also was a false statement on the part of managers in the Orlando RA because he believed the named subject was connected to terrorism and the managers knew it. German also complained that these alleged falsehoods were part of a pattern by Tampa Division management to cover up their responsibility for the poorly handled case and that the managers who made these statements should be held accountable.

The OIG conducted interviews with CTD officials who said that the EC was drafted after German's September 2002 letter on instructions from the Deputy Assistant Director to ensure that all information about CTD's role in this matter was documented. CTD officials told us the EC simply recounted CTD's involvement in the Orlando terrorism case. None of the CTD officials we interviewed said they had any cause to believe that Tampa Division management had misled CTD about the lack of any terrorism connection in the Orlando case. As noted above, both the Tampa Division review and the Inspection Division review did not establish that a viable terrorism case had been missed.

Additionally, our review of the case file, our interviews of the Tampa Division managers and agents, and the Tampa Division and Inspection Division reviews yielded no evidence that the responses given to CTD by Tampa managers were intentionally deceptive. To the contrary, the Tampa Division has maintained after all the informant meetings were reviewed in September 2002 that the subject named in the CTD EC was a "common criminal" with no credible link to terrorism.

5. Conclusion Regarding German's Cover-Up Allegations

The OIG substantiated German's allegations concerning the backdating of reports by the terrorism case agent. However, the OIG did not substantiate that the Tampa Division knowingly made false

statements in the December 2002 EC from the Tampa Division to FBI Headquarters concerning the taping of the key January 2002 meeting between the informant and two subjects in the Orlando investigation. In addition, the OIG was unable to substantiate that the Tampa Division made false statements about the Orlando case to CTD that were referenced in an October 2002 EC from CTD. Furthermore, the OIG found that the case agent took appropriate action when notified by German of the possible Title III violation that occurred when the informant left the recording device in the room with the subjects.

D. German's Allegations of Retaliation

1. Allegations

The OIG investigated whether FBI employees retaliated against German as a result of his complaints about the Orlando RA's handling of the Orlando case. In his October 2003 letter to the OIG, German claimed that he was an FBI "whistleblower" under the Department's regulations governing FBI whistleblower complaints and therefore was entitled to protection against FBI reprisals.[6] See 28 C.F.R. Part 27. The OIG notified German in January 2004 that we would investigate his allegations of retaliation.

In German's April 2004 interview with the OIG, he identified 20 instances in which he believed he was retaliated against for his disclosures. The OIG organized these instances into four sets of allegations:

- Whether the Orlando SSRA retaliated against German by making disparaging remarks about him to his co-agents in the Orlando investigation; by directing German's co-agents to have no contact with German; by telling German's supervisor in the Atlanta Division that German was not to contact anyone in the Orlando RA; and by indirectly suggesting in an EC sent to FBI Headquarters that German was not a qualified undercover agent.

[6] In his October 2003 letter to the OIG, German referred generally to statements made in 2002 by the President and the FBI Director requesting that federal agents disclose information about terrorism investigations that were being impeded by mismanagement. German also mentioned that the FBI had disseminated a procedure for agents to report such matters and be protected from reprisals. In a memorandum to all FBI employees dated November 7, 2001, regarding whistleblower protections, the FBI Director wrote: "The freedom to expose any impropriety within the Bureau, without suffering reprisal, is fundamental to our ability to maintain high standards of organizational performance and conduct and to expeditiously root out inefficiency and malfeasance. This critical freedom cannot be impaired by fear of reprisal or intimidation."

- Whether the Portland, Oregon, FBI SAC retaliated against German by attempting to exclude him from a new undercover investigation in the Portland Division.

- Whether Unit Chief Jorge Martinez retaliated against German by excluding him from participation in FBI undercover training schools and from undercover investigations.

- Whether German's Supervisory Special Agent supervisor in the Atlanta Division retaliated against him by allegedly responding insufficiently when German was named as an FBI undercover agent in a book published in 2002.

2. Whistleblower Regulations

Under the Department's regulations for FBI whistleblowers, an FBI employee may seek protection from retaliation for making certain types of disclosures. The general procedure for handling FBI whistleblower complaints is as follows:

(1) An FBI employee must make a disclosure to certain Department and FBI offices or officials relating to a violation of law, mismanagement, gross waste of funds, abuse of authority, or a danger to public health or safety. This is referred to as a "protected disclosure." 28 C.F.R. § 27.1.

(2) The FBI cannot take or fail to take specific types of "personnel action" involving the FBI employee as a "reprisal" for making a protected disclosure. 28 C.F.R. § 27.2. If the employee believes that the FBI has or will retaliate against the employee as a reprisal for a protected disclosure, the employee may report the alleged reprisal to either the OIG or the Department's Office of Professional Responsibility (DOJ OPR). 28 C.F.R. § 27.3.

(3) Either the OIG or DOJ OPR will be designated to investigate the alleged reprisal to "determine whether there are reasonable grounds to believe that there has been or will be a reprisal for a protected disclosure." 28 C.F.R. § 27.3(f).

(4) If the designated office conducting the investigation terminates the investigation, it must provide the complainant with a summary of the factual findings and the reasons for

termination. The complainant may then comment on the findings.

(5) If the designated office makes a determination of an improper reprisal, the findings then are sent to the Director, Office of Attorney Recruitment and Management (OARM Director). After reviewing the findings, comments from the complainant, and any response from the FBI, the OARM Director decides whether the protected disclosure was a contributing factor in any personnel action taken or to be taken against the complainant. If the Director determines that the protected disclosure was a contributing factor in the personnel action, then the OARM Director will order corrective action. However, corrective action will not be ordered if the FBI can show by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosure.

3. Protected Disclosure

As discussed previously, in September 2002 German, then an SA in the FBI's Atlanta Division, sent a letter to the ASAC for the FBI's Atlanta Division setting forth his allegations. German's letter was forwarded to the SAC in Atlanta and then to other entities within the FBI, including OPR, CTD, the Inspection Division, and the Tampa Division, which includes the Orlando RA.[7] In addition, a copy of German's letter and all of his subsequent letters on this matter were forwarded to the OIG.

German alleged in his September 2002 letter that the initiation of a UCO in a terrorism case in Orlando was being hindered because of the case agent's investigative deficiencies and because of supervisors' mismanagement of the case.

For a complaint to be a "protected disclosure" under the regulations, two requirements must be met. First, the FBI employee must make the disclosure to an office or an official specified in the regulations. German's letter to the ASAC was forwarded to the SAC for the Atlanta Division, who is the highest ranking official in the FBI field office. It also was forwarded to OPR and the OIG. The SAC, OPR, and

[7] The OIG noted that German's letter received broad circulation within the FBI. While there may have been a justifiable reason for each of the offices to be informed of the substance of German's complaints, it was not necessary to circulate a copy of his letter identifying him as the complainant. The OIG recommends that in the future the FBI consider drafting an EC containing the pertinent information but without identifying the complaint when not necessary. Such a procedure may decrease the risk of retaliation against the complainant.

the OIG are designated recipients for a protected disclosure under the regulations.

Second, the complainant reasonably must believe that his disclosure is evidence of a "violation of any law, rule or regulation; or [m]ismanagement, a gross waste of funds, an abuse of authority, or substantial and specific danger to public health or safety." 28 C.F.R. § 27.1(a)(1). In his September 2002 letter, German cited mismanagement by the Tampa Division and violations of laws and rules by the Tampa Division.

For example, German alleged that agents in the Orlando RA had not complied with FBI rules relating to documenting the informant's meetings with subjects and that FBI managers knew about these violations. He also complained that the investigation essentially had been dormant for more than 5 months because the Tampa Division and FBI Headquarters were debating funding issues and how the case should be handled. Prior to sending the September 2002 letter, German said he raised his complaints with supervisors and managers in Orlando, Tampa, Atlanta, and Headquarters through personal meetings, telephone calls, and e-mail messages.

The OIG concluded that German reasonably believed that his disclosure showed FBI mismanagement and violations of administrative requirements in the Orlando RA's handling of the terrorism case. Because German's letter was sent to the appropriate authorities and demonstrated a reasonable belief that there had been mismanagement and rule violations, the OIG concluded that German's September 2002 letter was a protected disclosure under the regulations.

4. Personnel Action

Employees of the FBI are prohibited from taking or failing to take, or threatening to take or fail to take, a personnel action against another FBI employee as a reprisal for a protected disclosure. 28 C.F.R. § 27.2. "Personnel action" is defined in 5 U.S.C. § 2302(a)(2)(A)(i)-(xi) and includes promotion, discipline, or transfer. It also includes "a decision concerning . . . education or training if the education or training may reasonably be expected to lead to an appointment, promotion, [or] performance evaluation. . . ." § 2302(a)(2)(A)(ix). In addition, personnel action encompasses "any other significant change in duties, responsibilities, or working conditions." § 2302(a)(2)(A)(xi). The analysis of whether German experienced a personnel action in reprisal for his disclosure is set forth in the next section.

5. Alleged Acts of Reprisal for the Protected Disclosure

As part of the OIG's investigation, we analyzed the four sets of allegations German raised to determine whether there were reasonable grounds to believe that there had been or will be a reprisal against German for his protected disclosures.

a. FBI Official Allegedly Made Disparaging Remarks

German alleged that after he provided to FBI management the September 2002 letter critical of the FBI Orlando RA's handling of the undercover investigation, the SSRA in Orlando retaliated against him. According to German, the SSRA made disparaging remarks about him to Orlando agents who had been working with German on the undercover matter and told the agents not to have any contact with German. German also said that the SSRA made negative statements to German's supervisor in Atlanta and repeated his order that German was not to have contact with either the agents or the informant in the Orlando investigation. In addition, according to German, the SSRA suggested in an October 2002 EC to FBI Headquarters that German was not a qualified agent or a team player.

In order to ascertain whether the SSRA retaliated against German, the OIG interviewed the SSRA, several Orlando Special Agents, administrative employees, and German's supervisor in the Atlanta Division. None of the employees in the Orlando RA recalled hearing the SSRA disparage German. However, several of the agents stated that the SSRA directed them not to have any contact with German as a result of the September 2002 letter. The case agent for the drug investigation recalled that the SSRA informed him that the FBI was initiating a review of German's allegations regarding mishandling of the terrorism investigation. According to the case agent, the SSRA instructed the agent to discontinue contact with German until after the review was completed. The case agent, who was friendly with German, viewed the instruction as appropriate in light of the impending review.

German's supervisor in Atlanta did not recall the SSRA in the Orlando RA instructing him that German was not to communicate with the Orlando RA agents, but the supervisor said it was quite possible that such a discussion had occurred. While the supervisor had no independent recollection of any conversation with the SSRA, he said that he would have remembered if the SSRA had made disparaging remarks about German.

In a signed, sworn statement to the OIG, the SSRA denied that he had retaliated against German. He stated that he did not say anything

derogatory about German to either his subordinates or to German's supervisor. He said that the SAC for the Tampa Division directed him to tell the agents in the Orlando RA to discontinue contact with German during the Tampa Division's review of German's allegations to avoid engaging in disputes with German, and he followed that instruction. He did not view that instruction as retaliatory.

On October 16, 2002, the SSRA wrote an EC to FBI Headquarters about the proposed undercover investigation in which German was to operate as the undercover agent. The EC consisted of a 30-page summary of the informant recordings made in the case and concluded with 5 pages of analysis on the status of the case. The SSRA concluded that the subject in the case was involved in drug trafficking and other criminal activity, but that no credible link tying him to terrorist activity or to terrorism had been established. The SSRA indicated that the case should proceed as a drug and money laundering investigation.

On the final page of the EC, the SSRA wrote "Tampa opines the money laundering angle can still be pursued by the [informant] and a qualified UCA [undercover agent] who can work as part of a team with the case agents." German believed the phrase "qualified UCA," which was not further explained in the EC, was meant to describe him as unqualified since he had been selected as one of the undercover agents in the case. The SSRA explained to the OIG that he did not intend by this reference in the EC to "smear" or retaliate against German. Instead, the SSRA said that he was concerned about German's conduct on the undercover matter, even before German sent his September 2002 letter.

Specifically, the SSRA told the OIG that he was concerned about German's excessive contacts with the informant without the knowledge of the case agent who primarily was responsible for handling the informant. In addition, the SSRA was troubled by German's communications with FBI officials outside of the Tampa Division about the status and direction of the undercover case without the knowledge of the Tampa Division management. The SSRA emphasized to the OIG that he wanted an undercover agent who was willing to be a member of a team instead of one who acted unilaterally.

The SSRA stated that he had no ability to retaliate against German because he did not have input into German's assignments and did not have supervisory authority over him. However, he also said that he "continued to allow SA German to participate in training or investigative matters in the time since he filed his [September 2002] letter."

The OIG concluded that the SSRA's statements in the EC to FBI Headquarters about having a "qualified" undercover agent assigned to

the case did not constitute a personnel action and therefore was not a reprisal for German's protected disclosure.

While the SSRA's instruction not to communicate with German may have significantly changed German's work on the undercover matter and therefore could constitute a personnel action, the instruction was in response to an order from the SAC for the Tampa Division and thus the implementation of the order cannot be tied to any retaliatory motive on the part of the SSRA.

The SAC justified the order not to communicate on the grounds that he wanted to avoid having Tampa Division personnel engage in further unproductive debates with German about the direction of the case while the review was pending. The SSRA and the Orlando RA agents viewed the SAC's instruction as appropriate in light of the impending review of German's allegations. The SAC's instruction constituted a personnel action, but we did not find sufficient evidence to establish a retaliatory motive on the part of the SAC. Shortly after receiving German's September 2002 letter, the Tampa Division management approved German as one of the undercover agents in the Orlando investigation. This action is further support for a lack of retaliatory motive on the part of Tampa Division managers.

Finally, we found no one who substantiated German's allegation that the SSRA made disparaging comments about German.

b. Oregon SAC Allegedly Tried to Exclude German From Portland Undercover Case

In August 2003, German was being considered as an undercover agent in a case in the FBI's Portland, Oregon Division. The Portland SAC, Robert Jordan, formerly served as the Assistant Director of OPR and in that role became familiar with German's complaint about the Orlando undercover matter. German alleged in his various correspondence to the OIG that Jordan retaliated against him by expressing concerns to Jordan's subordinates about German possibly serving as the undercover agent on the Portland case. One of Jordan's expressed concerns was that German could be identified publicly during the undercover operation as a result of his contacts with congressional staff.

We interviewed Jordan, two supervisors working for him, and the case agent in the Portland office about German's allegation. The supervisors said that Jordan characterized the prospect of using German as the undercover agent as "problematic" because of his request to speak to Congress regarding his concerns about the Orlando case. Jordan told

these supervisors to contact the Chief Inspector of the Inspection Division to get more information. The Chief Inspector told the supervisors that multiple investigations had found that German's allegations about the Orlando case were unfounded.

In interviews with the OIG, the supervisors told us that they viewed Jordan's comments to be directed towards the potential risk to the undercover operation if German was to be identified publicly as an undercover agent with the FBI. However, the supervisors said that despite Jordan's misgivings, they were inclined to select German as the undercover agent until German withdrew voluntarily from the case. The supervisors also told us that well before Jordan arrived in Portland, German had indicated to them that he was being rebuffed by FBI Headquarters because he had leveled criticisms about the Orlando case.

In an interview with the OIG, Jordan denied that he retaliated against German when he expressed concerns to his subordinates about using German as an undercover agent. Jordan stated that he knew from his former position as the Assistant Director for OPR that German had requested to speak with Congress, and Jordan was worried that, as a consequence, German's identity might become public during the undercover operation, which would be harmful to the case. Jordan also said that, because of his prior knowledge of the case due to his previous position with OPR, he ultimately recused himself from the decision on whether to use German for the investigation and left the decision to supervisors in his office.

In sum, the OIG did not find sufficient evidence to substantiate the allegation that Jordan's comments to his subordinates about German were in reprisal for his protected disclosure.

c. Allegation that German was Excluded From Future Undercover Cases and Undercover Schools

Jorge Martinez served as the FBI's Unit Chief of the Undercover and Sensitive Operations Unit (USOU) from April 2001 to March 2004. As the Unit Chief, Martinez had the authority to select agents to be instructors or evaluators at USOU schools that trained new undercover agents. According to several witnesses that we interviewed, participation as an instructor or evaluator at these schools was considered a prestigious assignment among agents who worked on undercover matters and enabled undercover agents to be chosen more readily for important assignments around the country. The witnesses also told us that participation also gave the agents exposure to the broader FBI undercover community and validated their status as accomplished

undercover agents. Prior to German's September 2002 letter, German was a regular trainer and evaluator at the USOU schools.

German's letter was, in part, critical of the USOU in that it named supervisors in the USOU who German alleged incorrectly discounted the predication for the undercover operation in the Orlando terrorism investigation and misapplied the FBI guidelines in downgrading the case to a lower FBI Headquarters priority that involved less support. German also complained that Martinez admonished him in an e-mail message to "stick to [field] matters" and leave policy matters to Headquarters.

German alleged that he had been intentionally excluded from participation at the USOU schools since sending his September 2002 complaint. He did not identify who was responsible for excluding him from the undercover schools, but he provided the names of two officials (not including Martinez) who would have additional information regarding his exclusion. We interviewed these two officials, Martinez, and several agents who had knowledge about comments that Martinez had made about German.

According to an FBI agent who worked in Martinez's building, in September 2002 Martinez and the agent were discussing German's letter. According to the agent, Martinez said, "As long as I am Unit Chief of this unit, Mike German will never come to another undercover school." The agent told the OIG that the agent advised Martinez against taking that kind of action because that was "exactly the kind of response" German wanted to prevent by requesting whistleblower protection in his letter.

In late 2002, another agent overheard Martinez state that German would "never work another undercover case."

An FBI official told the OIG that when he called Martinez in 2003 to ask Martinez if the official should use German at a local undercover school, Martinez said that he would not use German in any of the USOU training schools due to a lack of confidence in German.

In a signed, sworn statement to the OIG, Martinez said that he did not recall making any of these statements and denied retaliating against German for his criticism of the USOU. Martinez stated that if he did make the comment about never inviting German back to an undercover school, it was "knee-jerk reaction but did not mean to indicate I was retaliating against him." Martinez explained that he had not invited German to speak at the USOU schools since 2002 because he wanted to shift the focus from "war stories" to more "academic" content and that German tended to use "war stories." In addition, Martinez stated that he

wanted to place greater emphasis on international terrorism as opposed to domestic terrorism, which was German's area of expertise.

Martinez also said that he did not have the authority in his position as Unit Chief of USOU to influence the selection of an undercover agent in a field operation, unless he could give valid reasons to the SAC and to Martinez's superiors at Headquarters. He said that he never blocked German from working on an undercover operation.

Based on witnesses' testimony, the OIG concluded that the evidence indicated that Martinez excluded German from participation in the USOU schools as a reprisal for German's protected disclosure. This finding is supported by testimonial evidence from several witnesses and the fact that prior to September 2002 German had participated regularly as a trainer at the USOU schools.

German's exclusion from the USOU schools constituted an improper personnel action in that it was a "significant change" in his duties or responsibilities. See 5 U.S.C. § 2302(a)(2)(A)(xi). As discussed previously, several agents told the OIG that an agent's participation at the USOU schools was important to that agent's standing in the undercover agent community. Furthermore, an agent participating as a trainer in the undercover schools is more likely to be sought out for an undercover assignment because of the visibility or exposure that the school provides.

To determine whether German's exclusion was a "personnel action," the OIG analyzed decisions by the Merit Systems Protection Board (MSPB), an independent executive branch agency that adjudicates appeals of personnel actions by federal employees other than FBI agents. MSPB decisions provide that the definition of a "personnel action" must be interpreted broadly. Singleton v. Ohio National Guard, 77 MSPR 583 (1998); Shivalee v. Department of the Navy, 74 MSPR 383, 388 (1997). The 1994 Amendment to the Whistleblower Protection Act enlarged the category of potential "personnel actions" by deleting the former qualifying language that a change in responsibilities must be "inconsistent with the employee's salary or grade level." See Shivalee v. Department of the Navy, 74 MSPR 383, 388 (1997); Briley v. National Archives and Records Administration, 71 MSPR 211 223 (1996). The Legislative History of the amendment states that:

> [c]onsistent with the Whistleblower Protection Act's remedial purpose, the provision adding "any other significant change in duties, responsibilities, or working conditions" to listed personnel actions should be interpreted broadly. This personnel action is intended to include any harassment or

> discrimination that could have a chilling effect on whistleblowing or otherwise undermine the merit system, and should be determined on a case-by-case basis.

140 Cong. Rec. H11, 421 (daily ed. Oct. 7, 1994) (statement of Rep. McCloskey).

Based on this broad interpretation by MSPB and the legislative history for the provision dealing with "significant change in duties," the OIG determined that Martinez's exclusion of German from the undercover schools was a personnel action that involved "discrimination that could have a chilling effect on whistleblowing." The OIG concluded that there are reasonable grounds to believe that Martinez's exclusion of German from participation in the FBI undercover schools was in reprisal for German's protected disclosure made in his September 2002 letter.

The OIG concluded that there was insufficient evidence to establish that Martinez attempted to exclude German from any operational undercover cases. The agents involved in the proposed undercover investigation in the Portland office told us that they were unaware of any actions by Martinez to exclude German as an undercover agent or to discourage German's participation as an undercover agent.

d. FBI's Response to a Book Identifying German as Undercover Agent

German alleged that the FBI did not adequately respond to the disclosure of his name as an undercover FBI agent in a book published in 2002 that referenced an undercover case in which German was involved. German believed the inadequate response was a reprisal for his protected disclosure.

German's immediate supervisor in the Atlanta Division, an SSA, oversaw the response to the identification of German in the book. The SSA told OIG investigators that he coordinated closely with German to determine how difficult it would be for someone to actually locate German based on the disclosure of his name in the book. He told the OIG that German indicated to him that no further response was necessary at the time. The SSA stated that a significantly more aggressive protocol would have been employed if the identification of German had been deemed a threat. He also told us about discussions he had with German regarding contingencies that could be undertaken immediately on an emergency basis if the situation changed. The matter also was reported in an EC to Headquarters.

In interviews of the Atlanta personnel, the OIG found that the SSA was supportive of German's efforts in the Orlando case and had in fact encouraged German to prepare his September 2002 letter. We did not find sufficient evidence to conclude that the FBI responded inappropriately to German being named in the book. The fact that the response was overseen by German's SSA who coordinated closely with German on how to respond undercuts German's allegation that the FBI's decision not to take more aggressive action was in retaliation to German's complaints.

6. OIG Provided Portion of Report to OARM

The OIG has provided a portion of this report related to the finding of retaliation by Martinez and relevant background information to the OARM Director for appropriate action. If the OARM Director determines that the protected disclosure was a contributing factor in the personnel action taken, the OARM Director must order appropriate corrective action, unless the FBI demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

7. Summary of Findings on Retaliation Allegations

The OIG did not find sufficient evidence of retaliation by the SSRA when he made a reference in an EC to a "qualified" undercover agent, nor did we find retaliation by the Tampa Division SAC when he instructed agents not to communicate with German while a review of German's allegations was pending. The OIG also did not substantiate German's allegation that Jordan retaliated against German when Jordan expressed reservations to his subordinates about selecting German as an undercover agent for a case in Portland. However, the OIG did find that Martinez retaliated against German when Martinez caused German to be omitted from the list of instructors at the FBI's elite undercover school.

V. GERMAN'S COMMENTS TO THE OIG'S DRAFT REPORT AND THE OIG'S RESPONSE

In accordance with FBI whistleblower regulations, the OIG provided a draft of this report to German, notifying him of the OIG's factual findings and conclusions justifying the termination of the investigation and giving him an opportunity to comment on the OIG's findings. See 28 C.F.R. § 27.3(g). The regulations further provide that the OIG notify German of the termination of the investigation, summary of the relevant facts, reasons for the termination, and a response to any comments submitted by German. See § 27.3(h). This report serves to fulfill these requirements. The OIG has completed its investigation into

German's allegations, and this report provides a summary of the relevant facts and a response to German's main comments.

German provided 26 pages of comments to the OIG's draft report. These comments were not confined to the findings concerning his retaliation allegations, but also addressed many of the OIG's other findings in the report. German agreed with several of the OIG's findings, but he strongly disagreed with others and requested that the OIG reconsider its conclusions or that the OIG take further investigative steps. While the OIG concluded that German was retaliated against by Martinez, German stated in his comments that the OIG should have also concluded that he was retaliated against in other instances. However, German's primary objection to the draft report related to the OIG's conclusion that it did not find sufficient evidence that undermined the findings of the two FBI reviews that no viable terrorism case had been missed. German faulted the two FBI reviews and the OIG's assessment of the reviews. He also asserted that the OIG should have conducted its own investigation to determine if a viable terrorism case had been missed.

Based on German's submission, the OIG made several changes to the draft report, including, for example, the following factual corrections: (1) clarifying that the recordings of the January 2002 meeting were transcribed by the Tampa Division prior to German's September 2002 letter; (2) specifying that German actually was selected as one of the undercover agents in the Orlando terrorism investigation; and (3) making clear that German did not allege his Atlanta supervisor was responsible for the FBI's retaliation in not taking more aggressive action in response to the book identifying German. Furthermore, the OIG removed a finding that German disputed in his comments relating to a portion of the statement from the Orlando SSRA in which the SSRA told the OIG that he supported German's selection to provide training at a course for local police. The OIG also reviewed the recordings from the Orlando case file to confirm the accuracy of the partial transcript of the January 2002 meeting and to confirm the findings of the Tampa Division based on the recordings.

German's main objections to the draft report are summarized below by category, together with the OIG's response.

A. OIG's Knowledge of Deficiencies and Retaliation

1. German's Comment

German stated that the OIG knew about the deficiencies in the Orlando investigation in December 2002 when an OIG agent was present

during OPR's first interview of German and that the OIG did not take immediate action to address the deficiencies or to protect him against retaliation. German said that the OIG's failure to address the deficiencies and to protect him from retaliation caused him to resign from the FBI and to bring the matter to the attention of Congress and the public. He asserted that only this public pressure compelled the OIG to act.

2. OIG's Response

When German raised his allegations in his September 2002 letter, he did not allege that he was being retaliated against by the FBI for making a protected disclosure. Instead, he alleged mishandling and mismanagement of an investigation by the Tampa Division. His allegations were sent to CTD, which directed the Tampa Division to investigate. German contacted the OIG in December 2002 for assistance because he did not believe that the FBI was taking his allegations seriously. The OIG subsequently urged OPR to interview German, and an OIG investigator attended both OPR interviews of German. In the OPR interviews, German raised misconduct allegations against the case agent and Tampa Division management. However, the investigation of his allegations remained with OPR at this time because German had not yet alleged that the FBI was retaliating against him for making a protected disclosure.

During this period, the OIG also facilitated a meeting between German and CTD to enable German to raise his specific concerns about the terrorism investigation. In addition, the OIG was aware that the Tampa Division had initiated a review of his allegations that a viable terrorism case was missed and that the Inspection Division later initiated a separate review.

In October 2003, German sent a letter to the OIG alleging that the FBI was retaliating against him because of his complaints. After inquiring into the status of the FBI reviews and conducting a legal analysis of German's retaliation allegations in consultation with DOJ OPR, the OIG notified German on January 30, 2004, that the OIG would initiate an investigation to determine if the FBI had retaliated against him for making a protected disclosure.[8] During the course of our investigation, the OIG had repeated conversations with German to keep him apprised of the status and the timing of the OIG's review as it was being conducted.

[8] As set forth in subsection D, above, the OIG and DOJ OPR are the only offices granted authority to investigate FBI whistleblower complaints under the FBI whistleblower regulations, 28 C.F.R. Part 27.

German resigned from the FBI in June 2004, five months after the OIG had initiated an investigation into his retaliation allegations and two months after the OIG first interviewed him in connection with his retaliation claim. In public statements following his resignation, German said that he resigned from the FBI in order to report publicly on the "continuing failures" of the FBI's counterterrorism program.

B. OIG's Reliance on FBI Terrorism Reviews

1. German's Comment

German disagreed with the OIG's conclusion that we did not find evidence to undermine the conclusion reached by two FBI reviews that a viable terrorism case was not missed by the Orlando RA. German stated that the two reviews failed to take into account evidence that showed one of the subjects was linked to terrorist groups. German also argued that the OIG should have conducted its own investigation of the Orlando terrorism case to determine if there was a viable terrorism nexus because of deficiencies in the two FBI reviews.

As support for his contention that Orlando missed a viable terrorism case, German pointed to the partial transcript of the January 2002 meeting between the informant and the two subjects and the results of an indices search he conducted on the FBI's case database in the summer of 2002 involving one of the subjects in the terrorism investigation. German stated that the partial transcript of the January meeting showed that the subjects discussed terrorism activities. He also said that his indices search showed that one of the subjects had associations with extremist groups and a proclivity to engage in domestic terrorism.

German also disputed the OIG's characterization of the reason that the Domestic Terrorism Unit (DTOU) did not support the undercover proposal. German said that the reason for DTOU's decision to decline to support the proposal was not because the Orlando case had an insufficient connection to terrorism, but rather because the international terrorism aspect of the investigation was more prominent than the domestic terrorism aspect and therefore the international terrorism angle should have been pursued by the Tampa Division.

2. OIG's Response

While the focus of the OIG investigation was on German's retaliation allegations, the OIG nonetheless included within the scope of its review many of the other allegations that German raised, including

the FBI's alleged inadequate response to his allegations of mishandling and mismanagement of the Orlando investigation and the misconduct allegations against the terrorism case agent and Tampa Division management.

As part of the OIG investigation, we reviewed the Orlando case file on the terrorism/drug investigation and the files from the reviews conducted by the Tampa Division and the Inspection Division. We also reviewed files relating to German and the Orlando investigation from several FBI Headquarters components, including CTD, OPR, and USOU. In addition, we reviewed the recording and the transcript of the January 2002 meeting between the informant and the subjects, the recordings of a meeting between the informant and one of the subjects in February 2002, and conversations between the informant and the subject.

In assessing the reviews by the Tampa Division and Inspection Division, we also noted that both review teams included agents with significant counterterrorism expertise, and that the Inspection review was conducted by agents outside the Tampa Division. We also noted that both reviews examined the meetings involving the subjects and evaluated whether a viable terrorism investigation had been missed. In addition, the Inspection team reviewed the associations involving one of the subjects that German had found in a database search and identified as significant.

The case files also revealed that in April 2002, DTOU suggested that the Tampa Division fold the terrorism investigation into the drug investigation involving the same subject. Also in April 2002, DTOU advised the Tampa Division that DTOU and the FBI's National Security Law Unit had reviewed the undercover proposal for the terrorism investigation and had declined to support the proposal because the undercover proposal was related primarily to drug activities and not terrorism activities. The proposal that the DTOU declined to support included the February 2002 EC summarizing the January 2002 meeting. The DTOU also instructed the Tampa Division to keep the investigation pending and to inform FBI Headquarters if any connections to extremist groups subsequently were discovered. No reference was made in the instruction for the Tampa Division to submit the undercover proposal to one of the FBI's International Terrorism Units, as German suggested in his comments on the OIG draft report.

DTOU sent the Tampa Division an EC in June 2002 repeating its finding that the undercover investigation was primarily drug-related. The EC states that it was reviewed by the relevant international terrorism unit at the FBI, which did not find that there was any open international terrorism investigation of one the subjects of the Orlando case.

Even after the DTOU declined to support the undercover proposal in April 2002 and had folded the terrorism case into the drug investigation, German believed that the Tampa Division should have pushed more aggressively for an undercover proposal for the terrorism investigation. However, German stated in his comments to the OIG that the "window of opportunity to initiate an undercover operation is very small and the passage of time between the January [2002] meeting and the March 2002 meeting [between German and the Orlando agents] was already problematic."

German stated that he based his allegation that a viable terrorism matter in Orlando was missed on the partial transcript for the January 2002 meeting he had received and on the indices check that he conducted in the summer of 2002. However, the experienced staff on the Tampa Division and the Inspection Division reviews had this same information. Moreover, the two reviews had additional information, including the recording of the January 2002 meeting, the recording of a later meeting involving one of the subjects, and recordings of later contacts between the informant and one of the subjects.

Thus, we concluded that the Tampa Division and the Inspection Division conducted independent reviews and examined the relevant information when they each separately concluded that an undercover terrorism investigation was not warranted. In our review of these entities' reports and the underlying materials, we did not find any evidence that undermined those conclusions.

In addition, in our review of the recordings of the January 2002 meeting and a later meeting involving one of the subjects, we did not find any evidence that contradicted the findings of the two reviews. In fact, as noted above, the recordings contradict several of German's specific assertions about discussions that took place at the January meeting. For example, German alleged in his September 2002 letter that at the January meeting one of the subjects admitted that he financially supported several international terrorist groups and requested assistance from the other subject for transferring money to these terrorist groups. However, the recording revealed no such conversation. In addition, the partial transcript that German referred to in his comments does not contain such a conversation.

Moreover, the recording of a later meeting between the informant and one of the subjects from the January meeting, which apparently German has not listened to, showed that the informant continually pressed the subject to engage in money laundering, but the subject repeatedly stated that he did not want to engage in any illegal activity,

including money laundering. This subject also stated he did not perceive that the other subject who attended the January 2002 meeting had made any overtures to engage in money laundering.

C. OIG's Finding on the Title III Violation

1. German's Comment

German disagreed with the OIG conclusion that the Orlando RA appropriately handled the Title III violation that occurred when the informant left the room momentarily with the recording device taping the unmonitored conversations of the two subjects. German stated that a Title III violation is a serious violation of law and that appropriate procedures were not followed by the Tampa Division in addressing the violation.

2. OIG's Response

We determined that once alerted to the possible Title III violation by German, the drug case agent appropriately notified his supervisor and contacted a prosecutor for guidance on how to handle the violation. The agent stated that he followed the instructions of the prosecutor by giving the recording to the Orlando SSRA to segregate and advising the SSRA not to use it further in the investigation. As noted above, we confirmed with two knowledgeable officials at DOJ that the steps taken by the agent were appropriate, although the officials noted that only the portion of the recording where the violation occurred needed to be segregated.

As German pointed out in his comments, by the time the drug case agent had reported the violation to the prosecutor in August 2002, the recording of the meeting had already been transcribed and the transcript of the meeting containing the violation had already been disseminated to the investigative team, including German. This dissemination of the transcript may have tainted the investigative team. While German has attached great investigative significance to the transcript, he also appears to recognize that the use of the transcript for any investigative purpose was restricted by the instructions of the prosecutor.

D. The OIG Declined to Investigate Some Allegations

1. German Comment

German said that the OIG refused to investigate the FBI for allegedly making false statements in an August 2004 press release responding to German's public allegations about the mishandling of the

terrorism investigation in Orlando and refused to provide a written statement to him declining to investigate the matter.

The press release issued by the FBI referred to German's allegations as "untrue." The press release stated that "an exhaustive investigation and review of available evidence found no information to support allegations that the subject was involved in terrorism or terrorist funding, nor was there an apparent link between a domestic terrorist organization and an international terrorist organization." German said that the statement was false because it was contrary to the information in the transcript of the January 2002 meeting and references to the subject in FBI indices.

German also stated that the OIG should have taken action in response to his allegation that the FBI Inspection Division intimidated him when the Inspection team questioned German about allegations that he had engaged in misconduct. Specifically, German stated that the Inspection Division questioned him about allegations that he traveled on government expense without authorization and that he spent $50 in case funds without authorization.

2. OIG's Response

In August 2004, German contacted the OIG to complain that the FBI press officer had made false statements in a press release addressing German's allegations. The statements in the FBI press release appeared to be based on the two internal FBI reviews of the terrorism case (the Tampa Division and Inspection Division reviews). After reviewing the press release and German's complaint, the OIG determined that initiating an investigation into German's allegations of false statements in the press release was not warranted, in part because the OIG was already investigating related allegations by German.

In our examination of the Inspection Division review and interviews of the team, the OIG found nothing to indicate that the Inspection Division investigated German's travel authorizations, his handling of case funds, or any other aspect of his conduct. German had requested the interview with the Inspection team so that the team could be fully informed of his allegations.

E. OIG's Retaliation Findings

1. German's Comment

German disputed the OIG's conclusions of no retaliation by the Orlando SSRA and by Portland SAC Jordan. He also asserted that the

OIG should have found that USOU Chief Martinez impeded German's efforts to work other undercover cases. With regard to the Orlando SSRA, German stated that among other reasons the OIG should reconsider its conclusion is that the Orlando SSRA inappropriately provided German's September 2002 letter to USOU Unit Chief Martinez, who then retaliated against German. As to the OIG's findings related to Jordan, German requested that the OIG consider Jordan's alleged leak to Jordan's subordinates of information from the Inspection Division review.

2. OIG's Response

The OIG had analyzed German's initial allegations of retaliation by the Orlando SSRA, Jordan, and Martinez and reviewed legal decisions addressing when conduct by an agency constitutes a "personnel action" in "reprisal" for a protected disclosure. We concluded that the actions of the SSRA and Jordan did not constitute retaliation under the regulations. We considered German's additional allegations in his comments relating to the SSRA, Jordan, and Martinez and believe that our conclusions should remain unchanged. We explained those conclusions in Section IV(D)(5) of this report. We also previously addressed the issue of the wide dissemination within the FBI of German's September 2002 letter in footnote 7.

Finally, under the procedures set forth in the FBI whistleblower regulations, 28 C.F.R. Part 27, German will have the ability to present his arguments for finding additional retaliation to OARM for its independent determination concerning whether the actions of the FBI officials constituted retaliation.

CONCLUSION

The OIG substantiated German's allegations that the Orlando case was mishandled and mismanaged by the FBI's Tampa Division. Specifically, the OIG determined that the Orlando case agent for the terrorism investigation failed to timely document and review recordings of important meetings between the informant and subjects. The OIG also found that the case agent's supervisors were aware of these investigative deficiencies and did not take prompt action to correct them.

However, the OIG did not substantiate German's allegation that the Orlando case had a viable terrorism nexus that was missed. Two FBI reviews concluded that no viable terrorism case was missed. In the OIG's examination of the two reviews, and the case file, including the recordings, we did not find sufficient evidence to undermine the two reviews' conclusions regarding the lack of a connection to terrorism.

In addition, the OIG determined that following German's September 2002 letter the Orlando case agent had improperly added inaccurate dates to the investigative reports in order to make it appear as though the reports were prepared earlier. The OIG also concluded that someone changed the dates on the warning forms given to the informant relating to the use of the tape recorder, but we were unable to identify who was responsible. The OIG further concluded that the FBI should have reviewed German's allegations of a cover-up by the Tampa Division to determine if an investigation or referral to OIG was warranted, including the allegations of backdating by the case agent and alleged false statements in a Tampa Division EC. Finally, the OIG concluded that the former FBI Unit Chief for the USOU retaliated against German by excluding him from participating as an instructor in FBI undercover schools.

Mr. SHAYS. I also welcome our distinguished colleague, Representative Curt Weldon from Pennsylvania and ask unanimous consent that he be allowed to participate in this hearing, and without objection, so ordered.

Mr. Weldon, I don't know if you have an opening statement before we go to the witnesses, but we would recognize you.

Mr. WELDON. First of all, I thank you and the distinguished members of the subcommittee and the distinguished ranking member.

I think everyone on this subcommittee signed a letter that I circulated in December, 248 of our colleagues, asking Secretary Rumsfeld to allow witnesses to appear before Congress on Able Danger. They had tried to stonewall those appearances for several months. You have one of the key witnesses here before you, Lieutenant Colonel Anthony Shaffer, who is a decorated veteran, 23-year intelligence officer, who has been involved in the most dangerous areas of the world, embedded with our troops, and who had information to offer that could help us understand what happened before September 11th. They went to such great lengths that he was within 2 days of losing not only his pay but his health care for his two kids and destroying him completely until I, not just with the help of the 248 Members from both parties, both Steny Hoyer and Roy Blunt signed the letter, and all of you as well—but Gordon England at DOD on behalf of the Secretary joined in with the new head of DIA to put Tony back into place so he could testify today in uniform, and tomorrow he will testify before the House Armed Services Committee on what is going to be a hearing that is going to change, I think, the nature of this city.

I am not here to hurt any one administration, but, Mr. Chairman, I would ask unanimous consent to include summaries of whistleblowers I have worked with over the years: Jay Stewart, who was the former Director of Intelligence for DOE, had his career destroyed.

Notra Trulock was Director of Intelligence at DOE, testified before the Cox Commission, had his career destroyed.

Dr. Gordon Oehler was Director of Non-Proliferation at the CIA, made the mistake of telling us the truth, was eased out of his office.

Mike Maloof, Chief of Technology Security Operations Division in DTRA, has recently had his career destroyed.

Lieutenant Jack Daly, a naval intelligence officer, was lasered in the eye, and the administration covered up the laser operation by a Russian ship, had his career destroyed.

John Deutch and Jim Woolsey, both their stories are in here that summarize what has happened to them.

And as late, Mr. Chairman, as yesterday afternoon, Lieutenant Colonel Shaffer, who was given the approval to work with DIA to prepare his testimony for tomorrow, was approached by DIA official questioning him about what he was going to say, and you can ask him in his own words, but to me it was a clear effort at intimidating him.

Mr. Chairman, it is extremely important, as someone who works on defense issues constantly, homeland security and defense, with my Democrat colleagues in a bipartisan way, that we not let this

happen. It has happened in this administration, and it happened in the previous administration. It should not be acceptable any time a person simply wants to tell the truth. That is all Tony Shaffer wanted, to tell the truth, and they were within 2 days of taking away his health care for his kids and destroying his life.

That is not America, and that is not what this country is about, and I would hope that you and Ranking Member Waxman would use your influence to put legislation forward to protect people like this and simply allowing us to understand the problems that our Government has.

I also want to acknowledge Sibel Edmonds, who is in the audience, who also played a critical role in helping us understand. She, too, was a victim of harassment and whistleblowing action.

You know, I could go on and on, but these are the ones I have been involved with personally, and I submit these for the record.

Mr. SHAYS. Without objection, we will submit those to the record.

[The information referred to follows:]

Congressman Curt Weldon
Examples of
Intelligence Officials and "Whistleblowers"
Purged from the Intelligence Community
For "Politically Incorrect" Views
February 14, 2006

R. James Woolsey, President Clinton's first CIA Director, was not fired, but resigned after two years because of his lack of access to the president. This was probably brought about in part by Woolsey's—and the CIA's—unpopular candor about the flaws of Jean-Bertrand Aristide of Haiti. In addition, Woolsey had refused to fire his capable General Counsel—inherited from the first Bush Administration—and to replace her with an unqualified Arkansas lawyer pushed by Clinton and his White House staff. Ambassador Woolsey also told the truth to the U.S. Congress about: (1) the Clinton Administration's "cooking the books" in the notorious NIE 95/19, that dismissed the emerging ballistic missile threat to the United States from rogue nations and (2) President Clinton's misrepresentation that the so-called "detargeting agreement" with Russia had greatly reduced the threat to the United States from Russian ICBMs. Jim Woolsey was, in my opinion, and according to intelligence officers who served under him, the best leader and the most promising CIA Director in 20 years.

Jay Stewart was former Director of Intelligence at the Department of Energy when he asked me to save a special intelligence program from being destroyed by the Clinton Administration. Stewart created the "Russian Fission Program." It was one of the first intelligence projects to warn of a looming nuclear proliferation threat from Russia—a warning that proved prescient. Jay Stewart, a winner of the prestigious Bronze Intelligence Medal, was fired for defending the "Russian Fission Program," which was "politically incorrect" at a time when President Clinton was trying hard to portray his Russia policy as a big success.

Notra Trulock was Director of Intelligence at the Department of Energy when he came to me at the Cox Commission ("Select Committee on U.S. National Security and Military/Commercial Concerns with the People's Republic of China"). Trulock discovered that a spy working for China had penetrated our national laboratories and stolen the designs for our nuclear weapons. But Trulock found his investigation blocked by the Clinton Administration. The Administration was trying to cover up China's nuclear espionage in order to preserve good relations with Beijing, and to avoid political embarrassment. Notra Trulock's brilliant career in the Intelligence Community came to an end when he did his job: he cooperated with the Cox Commission's investigation of atomic spying by China. Trulock had been one of the most brilliant officers in the Intelligence Community when he was exiled by the Clinton Administration, and unfairly pilloried by Clinton allies in the liberal press, for exposing China's spying and the Clinton Administration's negligence.

Gordon Oehler was Director of the Non-Proliferation Center at the CIA. He always told the truth to me and in his annual reports to Congress about the growing threat to the

United States from ballistic missile and WMD proliferation. Gordon's reports were a constant irritant to the Clinton Administration. His conscientious reporting of the facts about Chinese and Russian proliferation of nuclear, biological, chemical, and missile technology to rogue states tended to contradict President Clinton's view that various arms control agreements—like the ABM Treaty, the Non-Proliferation Treaty, and the Missile Technology Control Regime—made a U.S. National Missile Defense unnecessary. In addition to being a superb scientist, Gordon Oehler was a profound thinker on matters of arms control policy. When the Clinton Administration finally drove Gordon out of the Intelligence Community, we lost one of our brightest stars.

John Deutch was universally respected as one of the brightest and most energetic members of the Clinton Administration while serving as Director of the Central Intelligence Agency. Deutch was on the short list of Clinton nominees to be Secretary of Defense. Then, Deutch made the mistake of honestly testifying to Congress that President Clinton's cruise missile strikes on Iraq had made matters worse in the Middle East. Shortly after Deutch's testimony, which angered President Clinton, the Administration leaked embarrassing and confidential details of a secret investigation into security violations by Deutch. Deutch's careless handling of classified materials did warrant private disciplinary action, but should not have become a public media circus to assassinate the character and competence of a man who served his country well. The leak forced Deutch to resign and ruined his career.

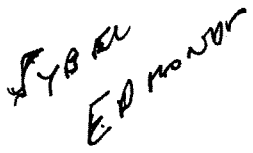
F. Michael Maloof was Chief of the Technology Security Operations Division in DTRA, the Defense Threat Reductions Agency in the Department of Defense. Maloof's job was to investigate commercial technology being sold to China to ensure that no "dual use" technologies were transferred that would help advance China's military programs. Maloof and his colleagues found that significant transfers of "dual use" technologies to China had occurred. These technology transfers to China posed a grave threat to the national security of the United States. Maloof told the truth to Congress. In open testimony Maloof described how Intelligence Community bureaucrats were pressuring him and his fellow analysts to remain silent. For this and other "politically incorrect" acts, a phoney pretext was found, and Maloof was eventually fired.

Lt. Jack Daly, a Navy Intelligence Officer, was on a routine mission on April 4, 1997 to approach by helicopter and photograph the Russian merchant ship *Kapitan Mann*. The freighter was suspected of gathering intelligence in the Strait of Juan de Fuca on U.S. nuclear submarines operating out of the OHIO-class sub base at Bangor, 20 miles west of Seattle. The security of our nuclear submarines is vital, as they are the backbone of our nuclear deterrent. In the course of his mission to protect the U.S. submarines from potentially hostile intelligence collection, Lt. Daly's eyes were injured by a laser fired from the Russian freighter. The Navy punished Daly for telling the truth—that the Clinton Administration tried to cover up the incident to avoid damaging relations with Russia. Daly was denied promotion because of his "political incorrectness." Daly's wounds ended his flying career, and became a worsening disability that forced him to retire from the service. Investigations by the House Armed Services Committee, in which I participated, exonerated Jack Daly. Eight years later, in 2004, the DOD's

Inspector General recommended that Daly receive the Purple Heart. In my view, this was too little, too late.

- As late as yesterday afternoon while one of the witnesses was preparing testimony for a hearing today and another tomorrow in the Armed Services Committee a DIA official was questioning this individual as what he was going to say in his testimony. A clear attempt at intimidation.

- Mr. Chairman it is important that when we develop Whistleblower protection legislation that we also consider legislation that takes action against the officials who reprise against whistleblowers.



Mr. SHAYS. We are going to get to the panel. I just would like to make one point. I think both sides of the aisle, at least in this subcommittee, are very supportive of the effort that was introduced, I think by Mrs. Maloney, to extend the same protections to those in the intelligence side. That amendment was not approved in part because some said more information, but the real significant reason was this committee reported out that bill and wanted to send it to the floor and knew that it would end up in every committee in Congress and never make the floor. So we are going to try to deal with that issue in a separate way, but we did put in that bill a requirement that the GAO report back to us on the issue of intelligence.

So at this time, let me just acknowledge that we have Specialist Samuel J. Provance from the Department of Army; we have Lieutenant Colonel Anthony Shaffer from the U.S. Air Force; we have Mr. Michael German from the FBI; we have Mr. Russell Tice from NSA; and we have Mr. Richard Levernier from DOE. We thank them all.

I would like them to stand, and we will swear you in, and then we will get to your testimony.

[Witnesses sworn.]

Mr. SHAYS. Note for the record all five of our witnesses have responded in the affirmative. You have a story to tell, gentlemen, and we have three panels so we will be a little more strict about the time. What we will do is when your 5 minutes is up, you will have another minute to kind of wrap things up, but we would like you to be done within 6 minutes. If it goes 6½, I am not going to lose sleep, but we do want your story to be told.

And so we will start with you, Specialist Samuel J. Provance.

STATEMENTS OF SAMUEL J. PROVANCE, SPECIALIST, U.S. ARMY, DEPARTMENT OF THE ARMY; LIEUTENANT COLONEL ANTHONY SHAFFER, USAR, SPRINGFIELD, VA; MICHAEL GERMAN, FORMER SPECIAL AGENT, FEDERAL BUREAU OF INVESTIGATION; RUSSELL D. TICE, FORMER INTELLIGENCE OFFICER, NATIONAL SECURITY AGENCY, AND MEMBER, NATIONAL SECURITY WHISTLEBLOWER COALITION; AND RICHARD LEVERNIER, GOODYEAR, AZ

STATEMENT OF SAMUEL J. PROVANCE

Specialist PROVANCE. Thank you, sir. My name is Samuel Provance, and I am a resident of Greenville, SC. After some years in college, I enlisted in the U.S. Army in 1998 and sought a specialization in intelligence in 2002. I was drawn to the Army by the professional training and the good life it promised, but also because it provided me an opportunity to serve my country.

The Army has stood for duty, honor, and country. In wearing my country's service uniform and risking my life for my country's protection, it never occurred to me that I might be required to be a part of things that conflict with these values of duty, honor, and country. But my experience in Iraq and later in Germany left me troubled by what I saw happening to the Army. I saw the traditional values of military service as I understood them compromised or undermined. I am still proud to be a soldier and to wear the uni-

form of the U.S. Army. But I am concerned about what the Army is becoming.

While serving with my unit in Iraq, I became aware of changes in the intelligence colleague procedures in which I and my fellow soldiers were trained. These changes involved using procedures which we previously did not use and had been trained not to use and in involving MP personnel in so-called preparation of detainees who were to be interrogated. Some detainees were treated in an incorrect and immoral fashion as a result of these changes. After what had happened at Abu Ghraib became a matter of public knowledge and there was a demand for action, young soldiers were scapegoated while superiors misrepresented what had happened and misdirected attention away from what was really going on. I considered all of this conduct to be dishonorable and inconsistent with the traditions of the Army. I was ashamed and embarrassed to be associated with it.

When I made clear to my superiors that I was troubled about what had happened, I was shown that the honor of my unit and the Army depended on either withholding the truth or outright lies. I cannot accept this. Honor cannot be achieved by lies and scapegoating. Honor depends on the truth. It demands that we live consistently with the values we hold out to the world. My belief in holding to the truth led directly to conflict with my superiors and ultimately my demotion.

I welcome the opportunity to speak to you today and to answer your questions.

[The prepared statement of Specialist Provance follows:]

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Samuel J. Provance
Prepared Statement

My name is Samuel Provance and I come from Greenville, SC. I enlisted in the United States Army in 1998 and sought a specialization in intelligence in 2002. I was drawn to the Army by the professional training and good life it promised, but also because it provided me an opportunity to serve my country.

The Army has stood for duty, honor and country. In wearing my country's service uniform and risking my life for my country's protection, it never occurred to me that I might be required to be a part of things that conflict with these values of duty, honor and country. But my experience in Iraq and later in Germany left me troubled by what has happened to the Army. I saw the traditional values of military service as I understood them compromised or undermined. I am still proud to be a soldier and to wear the uniform of the United States Army. But I am concerned about what the Army is becoming.

While serving with my unit in Iraq, I became aware of changes in the procedures in which I and my fellow soldiers were trained. These changes involved using procedures which we previously did not use, and had been trained not to use, and in involving military police (MP) personnel in "preparation" of detainees who were to be interrogated. Some detainees were treated in an incorrect and immoral fashion as a result of these changes. After what had happened at Abu Ghraib became a matter of public knowledge, and there was a demand for action, young soldiers were scapegoated while superiors misrepresented what had happened and tried to misdirect attention away from what was really going on. I considered all of this conduct to be dishonorable and inconsistent with the traditions of the Army. I was ashamed and embarrassed to be associated with it.

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I welcome the opportunity to speak to you today and to answer your questions.

Duty Position in Operation Iraqi Freedom

I was sent to Camp Virginia, Kuwait just before Operation Iraqi Freedom began in February 2003. I was the NCOIC of the Targeting Section of the V Corps ACE (Analysis and Control Element). It was from Camp Virginia that we fought the war, collecting intelligence, nominating targets for destruction, and overseeing deep attacks. My responsibilities focused on information systems.

At the war's end, I was placed as a section leader in the SYSCON (Systems Control) platoon.

Duty Positions from Abu Ghraib to Present

In September 2003, I was sent to the Abu Ghraib prison to replace SGT Andreas Zivic, who had been wounded in a mortar attack. I replaced him as the NCO in charge (NCOIC) of System Administration at the prison. We first had to recover the site that had been mortared. They had been working out of an unprotected and fully exposed tent, which was very unsafe as the site had been receiving mortar fire almost every day. A request had been made to move the operation into the hardened building right next to it prior to the fatal attack. The request was denied by COL Pappas – there was a great deal of sensitivity about what was going on in that hardsite and access to it was severely limited. As a result of conducting the operations in an unsheltered position, two soldiers were killed and numerous wounded, some disabled for life and chaptered from the Army. I later came to understand that this was one of the direct costs to my unit of the abuses that occurred at Abu Ghraib. I also served as the local Security Officer until relieved by CW2 [redacted] in January 2004.

At first there were only a couple companies of military intelligence (MI) soldiers (from the 325th Reserve and 519th Airborne) and a handful of computers, but then a group came from Guantanamo Bay (GTMO), Cuba to "make the place better run" (as we were told). There was a conflict between the GTMO soldiers and those who were already at Abu Ghraib, having to do with the way interrogations were being conducted and reported (I do not remember the specifics of the conflict, but in general our people wanted to use the techniques we were trained to use at Ft. Huachuca, and the GTMO people had very different ideas). After this period, the number of civilian contractors who reported in

[†] This statement has been redacted at the request of the Department of Defense to eliminate the names of personnel whose identities have not yet been publicly disclosed.

increased significantly. These contractors were principally from CACI and Titan Corporations, and were functioning as interrogators, translators and linguists. The interrogators were principally Americans, but the others were frequently Arab-speaking Middle Easterners, but not Iraqis. In the course of my duties, I would see some of these civilians regularly, others maybe only once or twice. Soldiers from other MI units then came, as well as even more civilians.

I worked the night shift (from 8 P.M. until 8 A.M. the following morning). My nightly routine consisted of making accounts for new users, troubleshooting computer problems, backing up the secret shared drive, maintaining the secret and top secret network connectivity, and manning the top-secret part of the Joint Interrogation and Debriefing Center (JIDC). SPC [redacted] worked with me and handled the day shift.

Mistreatment of Prisoners at Abu Ghraib

I had many discussions with different interrogators and analysts. Being "the computer guy," my job required me to interact with most of the MI team, and I often had the time to speak with them personally. Over time I began to get a pretty clear picture of what was being done to the detainees at Abu Ghraib. What I learned surprised and disturbed me.

The first alarming incident I heard about was that some of the interrogators had gotten drunk, and then under the guise of interrogation, molested an underaged Iraqi girl detainee. It could have been worse, but MP on duty stopped them. Friends of some of the interrogators involved were concerned that COL Pappas would deal severely with the incident. They asked me to recite a falsehood about COL Pappas, in the hope that he would be disqualified from serving as convening authority. I refused to do this.

I befriended SPC [redacted], an analyst who was being retrained to be an interrogator (many others were being retrained in this same way). [redacted] told me detainees were routinely stripped naked in the cells and sometimes during interrogations (she said one man so shamed had actually made a loin cloth out of an MRE (Meal Ready to Eat) bag, so they no longer allowed him to have the MRE bag with his food). She said they also starved them or allowed them to only have certain items of food at a time. She said they played loud music – "Barney I Love You" being the interrogators' favorite. I was shocked by this and told her I couldn't understand how she could cope with the nudity. Wasn't it embarrassing or at least uncomfortable? [redacted] said that this was one of the new practices and they got used to it. Moreover, she got a thrill out of being a woman interrogating them, knowing how much it angered and offended them to have a woman in

a position of authority and control over men. She said they used dogs to terrify and torment the prisoners. She also said they deprived them of sleep for long periods of time. This was all part of a carefully planned regimen that had been introduced after the arrival of the teams from GTMO.

[redacted] once invited me to accompany her to the hardsite, where I observed the MP's were constantly yelling at the detainees. One detainee was being made to repeat his number over and over again.

I also befriended SPC [redacted], who was with the first MP units that set up Abu Ghraib after the war. [redacted] told me that she had witnessed abuses of Iraqi people and even seen some of them murdered. She said she documented these things in diaries that she sent home to her family in case someone killed her before she made it home to do something about it. She particularly mentioned fearing her chain of command. Her view, that anyone disclosing these incidents of abuse would face swift and severe retaliation, was widespread among soldiers at Abu Ghraib.

SPC [redacted], an analyst I had known from training at Ft. Huachuca, told me that he had seen some detainees handcuffed together in contorted positions as punishment for raping a boy. He also said the interrogators were using the detainee's faith in Islam as a tool to break them and get them to talk. He said he was bothered by these practices – felt they were wrong – but wasn't in a position to do anything about it.

While eating at the dining facility at Camp Victory, SPC Mitchell, an MI guard, told an entire table full of laughing soldiers about how the MP's had shown him and other soldiers how to knock someone out and to strike a detainee without leaving marks. They had practiced these techniques on unsuspecting detainees, after watching, he had participated himself.

In discussions I had with some of my colleagues, brutal treatment of the detainees was justified by the fact that they were "the enemy" and that they "belonged here." But to my surprise, I learned that a large number of the detainees had no business being there at all. SSG [redacted], who worked in the outprocessing office, told me that most of the detainees had just been picked up in sweeps for no particular reason, and that some of them weren't even being tracked or registered. She also said they were all being kept there "indefinitely." Sometime later, I learned that a few detainees had been released and they were telling stories on the outside about having been abused while interrogated. The accounts at the time involved cigarettes being put in their ears and being told that American soldiers would be sent to rape their families. I was surprised about these claims

and asked SSG [redacted] what she thought. She said not only were these claims probably true, she had a good idea just which soldiers would have been involved.

SGT [redacted], whom I knew from my company, told me his soldiers (MI guards) were being subjected to and made to do things he did not like. He said when he and others from 302nd got to the prison, they were told they could "do whatever they wanted to the detainees," particularly while making them do exercises (a practice known as "smoking"). He described an incident in which [redacted] grabbed the ankle of one detainee, causing him to hit his head on the floor. They all laughed.

SPC [redacted], also from my company, gave me essentially the same account as SGT [redacted].

I was told that SPC [redacted] and [redacted] were relieved from interrogation duty by LTC Jordan: [redacted] for being too brutal and [redacted] for escorting a detainee naked in front of the general population.

A unit of MI guards was formed because the MP's no longer wanted to do the things they were being asked to do by interrogators. The MI guards were well known for being extremely rowdy at night, drinking bottles of Robitussin DM with tablets of Vivarin, and then partying in a dark room full of blinking lights and loud music. They were even doing this with one of the civilian interrogators ("DJ"), whom they worked for directly during interrogations. One night they came back with rings on their fingers and I asked where they got them, and they said they got them from detainees.

[redacted], a civilian interrogator, requested that I give him access to highly classified information. He said it was vital, and despite the fact that he had no clearance through the Brigade S-2, tried to convince me he had a clearance and demanded I give him this information. I declined his requests and reported the matter to the Brigade S-2. I nevertheless had the impression that civilian contractors were being given access to highly classified information notwithstanding the lack of proper clearance. Moreover, these civilian contractors involved in interrogation frequently behaved as if they were the superiors of the uniformed military interrogators, giving them directions and instructions. Their presence and activities clearly seemed to undermine or confuse the chain of command at Abu Ghraib and to undermine discipline and morale.

I spoke with a number of other interrogators and analysts, and most corroborated in some way the accounts of abuse and mistreatment I have described here. Most everything I note here was either widely known or openly discussed. The community there was very small, so even the mechanics and cooks knew a lot of what was going on. Because of these facts,

I was amazed that so few soldiers provided accounts of what happened during the official investigations undertaken by MG Taguba and then MG Fay.

In October 2003, one day I noticed that a delegation from the Red Cross was at Abu Ghraib performing some sort of mission. Word got around that the Red Cross had been very critical of what they saw at the prison. I hoped that this would lead to some changes. However, shortly after their visit, LTC Jordan spoke to our unit telling us of the Red Cross visit. He said they had made many complaints about the conditions in which the detainees were held. Jordan said by contrast their conditions were far better off than they were under Saddam Hussein. The message seemed to be that nothing was going to change, that everything was going on just the way the command authority wanted.

In December 2003, SPC [redacted] and I were in COL Pappas' office fixing his printer. COL Pappas and his staff captain were discussing staging a mock fast rope attack (in which assault troops would repel down ropes from helicopters) in the middle of the hardsites as a "Christmas present for the detainees." They laughed together about it, saying it would scare the bejeezus out of the detainees. I thought they were joking at the time, but it further convinced me that they had an attitude of indifference or even hostility towards detainees and that they wanted to use fear and intimidation as the main tools against them. Later, I read MG Taguba's interview with COL Pappas, and learned that he in fact staged this exercise, and defended it to MG Taguba as necessary to prevent a possible prison uprising.

The Taguba Investigation

Watching AFN one day in January 2004, I saw General Ricardo Sanchez talking about an investigation into what happened in the Abu Ghraib prison regarding abuses. In this way I learned that an investigation had been commenced. On January 21, 2004, I was interviewed by Criminal Investigation Division (CID) investigators at Abu Ghraib.

Days later we were told to go see CID investigators in groups. While there, we each were given a generic questionnaire asking questions about detainee abuse and some photographs. Based on what I already knew and suspected, I thought the focus of this investigation was going to be on interrogators and interrogations (both military and civilian). Because I had answered some of the questions "yes," I was called back to see CID. I got worried when the JIDC leadership announced to everybody who was being called back for interviews. I noticed very few others were called back, which implied they had nothing to say. As a result, the other soldiers there felt that I must be in trouble or

was telling on those who were. There was a great deal of tension within the unit at this time and concern about disciplinary measures that might be taken because of the abuse that had gone on. On the other hand, many felt confident that what was being done was consistent with new policies that had been introduced and that they would be protected.

I was interviewed by a CID agent, [redacted], when called back. I told the CID investigator everything I knew at the time and could remember. I was surprised that while I was providing information based on things other soldiers had told me, many of those soldiers were not talking to CID. I was concerned about this.

I had considered making a formal written complaint about what I had heard as early as October 2003. I didn't do this at this time for several reasons. One was that much of what I knew involved hearing accounts from other soldiers, rather than things I observed directly. But more than this, everything I saw and observed at Abu Ghraib and in Iraq convinced me that if I filed a report, I wouldn't be listened to, that it would be covered up. I thought that the best case was that I would be considered a troublemaker and ostracized, but that potentially I might even place my life in danger. Even when the CID inquiry began and I started to cooperate with the investigators, I was worried that something might happen to me.

In February 2004, I was redeployed back to Heidelberg, Germany and reunited with my company. The company took leave for a month.

Publication of the Abu Ghraib Photos

On April 28, 2004, I learned that CBS '60 Minutes' and the *New Yorker* magazine were publishing photographs of detainee abuse from Abu Ghraib. I understood immediately that these must be some of the photographs which had triggered the CID investigation. In the following days, this story was in the newspapers everywhere. None of the things which came out in those days were surprising to me, and they could not have been surprising to any of the soldiers I knew who served at Abu Ghraib at this time, because they were things the soldiers had heard, seen, or done themselves. I thought that the truth would finally come out.

But I was disappointed to see that only those few MP's in the pictures were being investigated, and that there seemed to be an effort to exclude the MI personnel from the process as much as possible. In the following days, I saw Secretary Rumsfeld appear on television many times in Washington, before a Senate committee, and then in Iraq,

explaining that this was all the work of a few "bad apples." He appeared to be setting up the MP personnel to be scapegoated and to be denying that what happened at Abu Ghraib was the result of policies and decisions that he and others high up in the chain of command had put in place. This struck me as extremely dishonest and I was shocked by it.

First Warnings about the Media

[redacted] gave daily briefs to the morning formation. About this time he began to vilify the news media. He said that no soldier was to speak with the media under any circumstances. He said a few in the 205th MI Brigade had already done so anonymously, and as a result, other soldiers were "looking for them." Another time he referred to it as the "web of Abu Ghraib" working its way to the company.

[redacted], an officer in the Analysis and Control Element (ACE), informed me that the next day I was to be interviewed by a general in Darmstadt. He told me that the scandal would probably be as bad as My Lai, and that even though he couldn't tell me not to speak to the press, he strongly advised I not do so.

Interview with General Fay

On May 1, 2004, I was interviewed by MG Fay in Darmstadt, Germany. I went with SPC [redacted] and SPC [redacted] to Darmstadt. There were a few other soldiers from B 302 MI BN, but I was surprised how few soldiers from my unit were there or otherwise involved in the investigation. Each of us was interviewed by MG Fay. Our statements were dictated by his assistant, and when they had been typed up, they were brought back in for review, edits and signature.

I was called in last. MG Fay explained that he was conducting an investigation into allegations surrounding Abu Ghraib. He then began asking me questions related to my knowledge of the Geneva Conventions, my military intelligence and particularly interrogation training, my interaction with LTC Jordan, certain MP's, photographs, and anything I had personally witnessed. I was astonished by the fact that he never asked me a question about the MI interrogators. I answered his questions to the best of my ability. After doing so, I told him that I didn't understand why he had no questions about the MI interrogators. I volunteered that most of what I knew or had heard came from them. He was not interested. I repeated that I had heard a number of very troubling accounts. He looked annoyed by this, but then he invited me to share some details with him. I then

shared with MG Fay much of the account that I just wrote in this statement. MG Fay was clearly very unhappy to have all this account. He pulled out my statement to CID from January and quoted back to me the passage in which I said I was glad something was being done because what had been going on was shameful. He then said he would recommend administrative action against me for not reporting what I knew sooner than the investigation. He said if I had reported what I knew sooner, I could have actually prevented the scandal. I was stunned by his statements and by his attitude.

Mistreatment of General Zabar and his Son

SPC [redacted] was informed that he would be interviewed by MG Fay. I told [redacted] that it was most likely because I had mentioned his name in connection with the interrogation of General Hamid Zabar, an Iraqi flag officer, and his 16-year-old son (we had interrogated his son together; the son was incorrectly reported as having been 17 years old). I told him the account I had given, namely that General Zabar had been mistreated and his son taken prisoner to get him to talk. [redacted] then he corrected me, saying it was in fact the general's 16-year-old son who was abused to get the general to talk, explaining it in detail. He promised me that he would be sure to give MG Fay a complete account, which he did. I was extremely uncomfortable about the way General Zabar had been treated, but particularly the fact that his son had been captured and used in this way. It struck me as morally reprehensible and I could not understand why our command was doing it. Later [redacted] told me he had been reinterviewed about this incident twice by CID investigators, who had cautioned him and tried to persuade him to change his account. It was clear that the investigators were very concerned about the incident.

On May 3, 2004, I was placed as the EUCOM (European Command) NCOIC within the ASI (All Source Intelligence) platoon.

On May 4, 2004, MG Taguba's SECRET/NOFORN report was leaked. Soldiers in my company told me that my name was on the internet, listed on this report. I realized that I had now been publicly identified as a witness, something I never expected to happen. But I was completely shocked to find out I was the only MI soldier listed as a witness ([redacted] being the only MI civilian). I could not understand how it was possible that other MI soldiers failed to give accounts of what they did or saw.

On May 12, 2004, I gave telephonic testimony at SPC Megan Ambuhl's Article 32 proceeding from Patton Barracks, Heidelberg, Germany (the hearing was in Baghdad). I

gave my testimony and both my name and portions of my testimony were reported in the news the next day, something else I did not expect to happen. I was surprised when I discovered that my testimony ran contrary to the contentions of the prosecutors in Ambuhl's case. I had thought that the prosecutors were working to reveal what happened and to punish the wrongdoers. After this experience, I was increasingly suspicious of how the prosecutions were being handled. They seemed to me to be designed to shut people up, not to reveal the truth about what happened and punish all the wrongdoers. In particular, they seemed focused on trying to shut off the responsibility of those who were higher up the chain of command.

Ordered to be Silent about Abu Ghraib

On May 14, 2004, I was ordered by CPT [redacted] not to "discuss" Abu Ghraib. While off-duty, I received a phone call from CPT [redacted]. He told me it was urgent that I come in to see him in his office. When I arrived, he handed me a written order not to speak with anyone in anyway about Abu Ghraib. He said that he didn't want me to ask him any questions or say anything, only to read the order and sign it. I was very disturbed by this order. I told him that my name was now in the papers in connection with the Abu Ghraib case. What was I supposed to do when I got a call from my mother asking me if her son was an abuser? In response, he repeated that I was not to ask questions or say anything, only to read the order and sign it. He presented this as an order. [redacted] was there. I did as he ordered.

Immediately afterwards, I asked other soldiers who were at Abu Ghraib in my company if they had received any similar written orders and they all said, "no." To this day, I know of no other soldier who was at Abu Ghraib to receive any similar written orders. I am convinced that the order was issued because I was speaking honestly and candidly about what happened and because of concern that the information I was providing would be circulated in the media and to Congress.

Interview with ABC News

My mother told me that ABC News had tried to contact me through my former wife in South Carolina. I made a mental note of it at the time, but understanding what a sensitive issue this scandal and investigation was, I did not respond. Later, however, I became convinced that a massive effort was under way within the military to cover up what had

happened at Abu Ghraib and to scapegoat a handful of MP's. I was particularly concerned that no higher ups, whether policymakers or officers with responsibility for Abu Ghraib, were being held to account for what happened. I considered this to be highly dishonorable. I remembered reading the speech of a holocaust survivor who was saved when her camp was liberated by American soldiers. One of those soldiers took care of her, married her and took her back to America. She summarized the lesson of her life with these words: "Thou shalt not be a victim. Thou shalt not be a perpetrator. Above all, thou shalt not be a bystander." After what had happened at Abu Ghraib, I was haunted by this thought. I felt I owed a duty to those who were suffering abuse, and just as much to my fellow soldiers who were trapped, suffering and degraded by the implementation of these new policies. That duty was to speak, no matter the consequences that I might suffer. I decided to do so.

On May 16, 2004, I was again contacted by ABC News and asked to talk about both what had happened in Abu Ghraib and in the investigation. I agreed. My interview with reporters Brian Ross and Alexandra Salmon was aired on ABC's 'World News Tonight with Peter Jennings' on May 18, 2004.

Interview with Senator Graham

On the morning of May 21, 2004, Lindsey Graham, the senator representing my home state of South Carolina, called me at home. The conversation I had with Senator Graham marked the first time a representative of our government was in touch with me, asking serious, focused questions which made clear that he was determined to get to the bottom of what had happened. Although we had only a brief conversation, Senator Graham covered a wide range of topics with me, and he was particularly focused on the role of MI in the abuses at Abu Ghraib and the specific techniques or procedures which had been used. Speaking with Senator Graham made me feel that my ABC News interview was having a positive effect, that now something would be done, the stonewalling would stop, and the truth would come out. After the call from Senator Graham, I was contacted repeatedly by staff members of the Senate Armed Services Committee requesting clarification and further information on the matters I discussed.

I had a strong sense that immediately from the time Senator Graham first contacted me, my command was aware of my communications with him and Congressional staff. From this point forward my relations with my unit got progressively tenser.

Flagged, Suspended Security Clearance

On May 21, 2004, I was administratively flagged and my top-secret clearance suspended by [redacted] in Wiesbaden, Germany.

I met my assigned JAG lawyer, [redacted], and I reported to [redacted]. In his office were several people, all in my chain of command, who were sitting behind me (later I learn that [redacted], [redacted] and [redacted] were present so that they could each sign a document as witnesses if I refused to do so). [redacted] read me a DA 4856 that flagged me and suspended my clearance, then asked me to sign it. I told him that my lawyer had instructed me not to sign anything until it had been reviewed by counsel, and said I did not want to disregard this instruction. [redacted] got very angry and demanded that I sign it. I repeated my lawyer's instruction, and then [redacted] dismissed me. [redacted] then came to me a few minutes later saying, "All you had to do was sign it." When I got back to my company, I turned in my security badge and reported to the headquarters platoon.

The flag was "pending the outcome of MG Fay's investigation," and its basis was "a violation of an order issued to you by your company commander." The suspension of my top-secret clearance was due to the claim that my "reliability and trustworthiness" had been "brought into question," and that I was now "vulnerable to influence and pressures from outside agencies/organizations that may be contrary to the national interests and the procedure 15 investigation into abuses."

I was told that CID wanted to question me regarding the interview given to ABC News, but they were referred to my JAG lawyer. I never heard from them again.

[redacted], my platoon sergeant up to May 2004, prepared an NCOER (a permanent evaluation report for sergeants). I was to receive a "no block" under "Duty" in the "Army Values" column, because I had "disobeyed a direct order." I protested this to her and MSG [redacted] (he was a third party to the counseling), but they said it didn't matter; an order was an order even if it was wrongly given. I then asked how she could do this since I was no longer in her platoon. Later that day SFC [redacted] called me and said she realized I was not in her platoon, that the counseling was getting shredded, and that my NCOER (to be read by LTC [redacted]) was going to be "good and fine." I still have a copy of the now shredded document. When LTC [redacted] read my NCOER, he made a point of telling me that the work I did at Abu Ghraib was very good and that he was proud of my performance. He appeared to be aware of the risks I was taking and was offering me moral support.

In early June 2004, SGT [redacted] told me that leaders in the ACE were delivering briefings to soldiers in which I was harshly attacked. My statement to ABC News was described as "a lie," and they claimed that it would be used as "propaganda by the enemy." In sum they were labelling me as a traitor. SGT [redacted] later confirmed this account. I understood what they were doing as a demonstration to other soldiers who had been at Abu Ghraib: if you speak up about what really happened, you will be cast out and targeted.

On August 25, 2004, the MG Fay/LTG Jones Report was released. [redacted] gave the analogy of a soldier whose only job is to turn screws and says he "should only talk about turning screws, nothing else." This was understood by everyone as a reference to me and my willingness to answer the investigators' questions freely. SGT [redacted] approached me later at the motor pool to ask me how "the screwing" is coming along.

Even though the Fay Report was completed, I remain flagged and my clearance suspended.

On September 1, 2004, I was requested to come to Washington, DC by a member of the Senate Armed Services Committee to assist in preparations for a hearing on the Fay/Jones Report.

The Pentagon delayed my flight, according to [redacted], inhibiting the goal of my travel. I was to leave that Friday, and had tickets to do so, but was told I couldn't leave until Monday. As a result, my time with Senate staff was cut down to just the 48 hours – one day before the hearings and the day of the hearings themselves. I missed meetings that had been set over the weekend to assist staffers in preparations for the hearing.

On my return, [redacted], the battalion executive officer, openly mocked one of the senators and likened my trip to a "Herbie Goes to Washington" movie.

Reduced in Rank

In July 2005, I was given an Article 15, and reduced in rank for "disobeying a direct order," namely, the order not to speak about what happened at Abu Ghraib. During the initial reading, LTC [redacted], the convening authority, said that if I had demanded a court martial, I could have faced 10 years in prison. My flag was lifted (confirmed on Enlisted Records Brief) and my top secret clearance was placed in adjudication.

SAMUEL J. PROVANCE

Dated: Washington, DC
February 13, 2006

Mr. SHAYS. Thank you very much for your testimony and for being here.

Colonel Shaffer. And would you make sure your mic is closer. There we go.

STATEMENT OF ANTHONY SHAFFER

Colonel SHAFFER. Mr. Chairman, distinguished members of the subcommittee, thank you for the opportunity to appear before you today to offer my comments surrounding the use of the security clearance system as a method of intimidation and retaliation, and in my case, the removal of my security clearance based on my protected disclosures of information to the 9/11 Commission and to Congress regarding Operation Able Danger.

Many of us take seriously our oath of office to support and defend the Constitution against all enemies, foreign and domestic. We demonstrate our commitment by decades of service to this country trying to conduct operations to ensure our citizens are protected.

There are officers within the bureaucracy who abandon their oath of office and instead become focused on a strategy of self-preservation and obstruction of accountability. A culture now exists in which leaders with this abhorrent set of values are in charge of large portions of the intelligence community. It was their missteps before September 11th that materially contributed to our failure to detect and neutralize the September 11th attacks.

While disclosure of Able Danger information to the 9/11 Commission and to Members of Congress was not the only factor in the revocation of my clearance, it is my judgment and the judgment of others that it is the primary reason that DIA made such an obvious, unjustifiable effort to remove and silence me. It is notable that I have been requested, as Congressman Weldon pointed out, to speak in front of the House Armed Services Committee to provide a top secret/full disclosure testimony on the Able Danger operation tomorrow.

Let me be up front here. I am no Boy Scout. I was not hired as an intelligence officer because I hang out at the Christian Science Reading Room. My job is to get information using tried and true intelligence methodologies, techniques that go back to the dawn of civilization. I have been trained to take risks, to create high-risk/high-gain operations, which I did successfully for 20 years.

My awards and accolades have been provided to the subcommittee for your background, and according to my legal counsel, until I disclosed the Able Danger information, I was a "rock star." DIA arbitrary removed me from active intelligence officer status in June 2004, where this process began.

It was in my work as the chief of a DIA special mission task force back in 1998 that I became involved with Able Danger. My officers and I were working at the cutting edge of technology and DOD black operations. Most all of my operations and operational records remain classified as most of the operations and the capabilities we established are still ongoing and being utilized in the war on terrorism.

I accepted a recall to active duty after the September 11th attacks, took command of an Operating Base, and deployed to Afghanistan twice. During the deployment to Afghanistan in October

2003, I made my first protected disclosure to Dr. Phillip Zelikow, the staff director of the 9/11 Commission, regarding Able Danger and the failures of DIA and other DOD elements to maximize the intelligence information and promise of the project.

I wish to emphasize four key points.

I have made protected disclosures, starting in October 2003, regarding Able Danger, a pre-September 11th operation designed to identify and conduct offensive operations against al Qaeda. It was these protected disclosures, first made to the 9/11 Commission, that I believe is the basis for DIA's adverse actions against me. I revealed the fact that there were internal DOD and DIA failures regarding September 11th. It was the factor that resulted in the allegations being drummed up against me starting in March 2004.

The three allegations that DIA tried to use against me were first related to an attempt to thinly veil administrative issues being tied to the Uniform Code of Military Justice's criminal issues. There is a clearly defined process for criminal issues. These allegations never once grew anywhere close to that level. In addition, they were never, according to DOD's personal security guidelines, supposed to be used as clearance adjudication issues. The three allegations used by DIA for the basis of their attempt to end my career are as follows:

Undue aware of the Defense Meritorious Service medal. DIA claimed I received an unlawful award unduly, despite the fact the award was for, amongst other things, Able Danger. I provided classified officer evaluation reports and other supporting documents showing that the award was due. There was no evidence in the DIA IG report that I did anything wrong. To the contrary, it showed I followed the process I was given by the chain of command. I wear the award today on my chest. You can see it. The Army chose to not take any adverse action against me.

Misuse of a Government phone, the second issue. Misuse of a Government phone to $67. During the time I was in command of an operating base where I had access and ran millions of dollars of equipment and more than a dozen personnel, they did an investigation of my command. The only thing they could find is that over an 18-month period I would periodically program a Government phone to forward phone calls to my personal mobile phone so they could stay in touch with me on weekends, for a charge of 25 cents for every call forward, accumulated over 18 months.

Mr. WELDON. Where were you?

Colonel SHAFFER. Here in the local area, sir. I ran a base, which I cannot get into, which was another organization.

Mr. WELDON. It broke down?

Colonel SHAFFER. Yes, sir.

The last issue, filing a false voucher for $180. I attended Army Command and General Staff School at Fort Dix, NJ, a requirement for the promotion to Lieutenant Colonel. Despite this being a wholly legal claim for mileage, which DIA processed through their system legally, I was told by the DIA IG that I falsely stated the claim even though there is clear evidence and I obviously got promoted to Lieutenant Colonel. They said because there was no expense to the Government, it was an illegal claim, although I could have eas-

ily filed it on my income tax had it been rejected by the Government.

To summarize the allegations, the total alleged loss to DOD was $250. The DIA Inspector General did falsely and without evidence make conclusions on the investigation of wrongdoing which could not be supported.

DIA then took these false allegations, embellished them, and went about resurrecting allegations which go back to high school, where I disclosed on a 1986 polygraph regarding some pens. A 1986 polygraph that I disclosed. This was not an investigation. And it goes back 30 years.

DIA's allegations were refuted, repeatedly, on three separate occasions: in writing in April 2005, in an oral statement in June 2005, and again in my final appeal in November 2005; all to no avail. These issues were offered in writing. They have been offered to the subcommittee in writing so you can review them yourself. One of the most egregious rejections was they rejected a DSS senior special agent's statement in writing saying that she had investigated and refuted these allegations prior to 1995.

Despite the Army's "clearing me" of wrongdoing and promoting me to Lieutenant Colonel, sorry, let me conclude.

I became a whistleblower not out of choice, but out of necessity. Many of us have a personal commitment to the truth, and——

Mr. SHAYS. I don't mean to speed up. Slow down a little bit.

Colonel SHAFFER. OK, sorry. I became a whistleblower not out of choice, but out of the necessity to tell the truth. The commitment to defend this country is not only simply going into combat but actually trying to fight the bureaucracy which has slowed us down in many instances.

I have tried to expose the truth of the September 11th attacks, which I will hopefully provide more information tomorrow. There is a need to legitimately hold individuals accountable for their actions or inaction regarding clearances and the security clearance system. There should be, I believe, an independent IG which looks at issues and also a "must issue" system which shows some ability to issue a person a security clearance and retain it as long as there are no allegations against them and establish, if you will, a list of penalties for minor indiscretions which could be used objectively for either an SES or a sergeant, no matter what that is.

Anyway, thank you for allowing me to share with you the information regarding the DIA retaliation against me regarding my disclosures of Able Danger information.

[The prepared statement of Colonel Shaffer follows:]

ORAL STATEMENT OF LTC ANTHONY SHAFFER.

BEFORE THE SUBCOMMITTEE ON NATIONAL SECURITY
HOUSE GOVERNMENT REFORM COMMITTEE

TUESDAY, FEBRUARY 14, 2006

"REMOVAL OF SECURITY CLEARANCE IN RETALIATION FOR PROTECTED DISCLOSURES OF ABLE DANGER"

Mr. Chairman, distinguished members of the Committee, thank you for the opportunity to appear before you and offer my comments on issues surrounding the use of the security clearance system as a method of intimidation and retaliation; and in my case, the removal of my security clearance based on my protected disclosures of information to the 9/11 Commission and to Congress regarding Operation ABLE DANGER.

This is a topic of extreme importance to our national security as we are at war and must be focused on neutralizing the threats to the United States – those that are both foreign and domestic.

Many of us take seriously our oath of office to support and defend the constitution against all enemies' foreign and domestic – we demonstrate our commitment by decades of service to this country trying to conduct operations to ensure our citizens are protected.

There are other officers within the bureaucracy who abandon their oath of office and instead become focused on a strategy of self preservation and obfuscation of accountability. A culture now exists in which leaders with this abhorrent set of values are in charge of large portions of the intelligence community; it was their missteps before 9/11 that materially contributed to our failure to detect and neutralize the 9/11 attacks.

While disclosure of ABLE DANGER information to the 9/11

Commission and to members of Congress was not the only factor in the revocation of my clearance, it is my judgment, and the judgment of others that it is the primary reason that DIA made such an obvious, unjustifiable effort to remove and silence me. It is notable that I have been requested by your colleagues on the House Armed Services Committee to provide Top Secret/closed testimony on the ABLE DANGER issue tomorrow.

Let me be upfront here – I am no boy scout – I was not hired to be an intelligence officer because I hang out at the Christian Science Reading Room. My job is to get information using tried and true intelligence methodologies – techniques that go back to the dawn of civilization. I've been trained to take risks – to create high risk/high gain operations, which I did successfully for 20 years.

I served in DoD with distinction as a Military Operations Training Course (MOTC) trained case officer. I graduated from "the Farm" in 1988 at the top of my class – training that costs, per student, upwards of a million dollars.

My awards and accolades have been provided to the committee for your background; according to my legal counsel, until I disclosed the ABLE DANGER information I was a "rock star". DIA leadership, using issues and information they manufactured, arbitrarily removed me from active case officer status in Jun of 2004.

It was in my work as the chief of a DIA special mission task force that I became involved with ABLE DANGER. My officers and I were working at the cutting edge of technology and DoD black operations. Most all of my operational record remains classified as most of the operations, and the capabilities that we established, are still on going and are being utilized in our war on terrorism.

After 9/11, I continued my service to the country by accepting

recall to active duty and taking command a DIA Operating Base and volunteered for two deployments to Afghanistan. It was during my first tour to Afghanistan in October 2003, that I made my first protected disclosure to Dr. Phillip Zelikow, the staff director of the 9/11 commission, regarding ABLE DANGER and the failures of DIA and other DoD elements to maximize the intelligence and promise of the project.

I wish to emphasize four key points.

1) I have made protected disclosures, starting in October 2003, regarding the project known as ABLE DANGER – a pre-9/11 operation designed to identify and conduct offensive operations against Al Qaeda. It was these protected disclosures, first made to the 9/11 Commission in 2003 that I believe is the basis for DIA's adverse action against me. In these disclosures I revealed the fact that there were internal DoD and DIA failures regarding pre 9/11 intelligence handling contributed to the failure to detect and neutralize the attack. As a result, after I notified DIA leadership in January 2004 of my disclosures to the 9/11 Commission staff, DIA officials used "administrative issues" to suspend my security clearance in March 2004. These issues, according to a senior Defense Security Service (DSS) investigator who reviewed and submitted a rebuttal to the allegations, have "no security relevance" in accordance to current DoD security policies, an therefore should not have been used as justification to first suspend my clearance. DIA expedited the permanent revocation of my security clearance – in record time according to my attorney - after a second set of protected disclosure to Congressman Curt Weldon. DIA chose to permanently revoke my clearance in September of last year – this revocation coming within 48 hours of my scheduled testimony before Senator Specter's Senate Judiciary

Committee.

2) The three allegations DIA used to first suspend my clearance in March 2004 and then justify its removal are all "administrative" issues – not criminal. In a thinly veiled attempt to criminalize them, DIA leadership attempted, and failed, to tie the allegations to the Uniformed Code of Military Justice (UCMJ). There is a clearly defined process for handling criminal issues – the allegations DIA made against me never came close to that level. In addition, they were never, according to DoD's personal security guidelines, supposed to be used for clearance adjudication – and yet they were. The three allegations used by DIA as the basis for their adverse, career ending action are:

    a. Undue award of the Defense Meritorious Service Medal (DMSM). DIA claimed that I received a major decoration unlawfully – despite the fact that the award was for, among service in other reserve leadership positions, my work on ABLE DANGER. Though I provided classified officer performance evaluations and other background documents that showed the justification for the award, the information was ignored by the DIA IG and DIA Security. There was no evidence in the DIA IG report that I did anything wrong – to the contrary - it showed I followed the guidance I was given by my chain of command.

    b. Misuse of a government telephone adding up to $67.00. While in charge of a DIA operating base in which I was responsible for millions of dollars of equipment and the activities of more than a dozen people, the government phones were issued to my unit this was the only adverse issue that could be found.

During an 18 month period, I would periodically program the government phone to forward phone calls to my personal mobile phone – for a .25 cent charge for every call forwarded. This added up to $67.00.

c. Filing a False Voucher for $180.00. I attended Army training a Ft Dix, New Jersey that was required for my promotion to lieutenant colonel. Despite this being a wholly legal claim – one processed through the DIA financial system – and one that, had it been rejected by the accounting system, I could have claimed as a professional deduction on my taxes – DIA's IG falsely stated that it was an illegal claim because I was authorized to attend the Command and General Staff School at "no expense to the government".

d. Summary of allegations – the total alleged loss to DoD was less than **$250.00** – that is right **$250.00**. The DIA IG inspector, Mike Kingsley did falsely and without evidence, makes conclusions on his investigation in which the evidence did not support.

e. DIA security then took the false DIA IG allegations and embellished them. DIA Security went about resurrecting allegations that were long ago, favorably to me, resolved – some dating back as far as high school (which was a self admission on a 1986 polygraph exam) and adding in recent inter-office politics that were not of security relevance to attempt to justify their action.

3) The DIA allegations were refuted – repeatedly – on three separate occasions – the documents have been provided to your committee staff. Refuted first in my official written statement in April 2005, again in my official oral statement made the first week

of Jun 2005 and again in my final appeal in November 2005 – all made to no avail. Specific written witness statements were made by senior officers who supervised me during the period – including both direct supervisors and my commanding general of the period. These written statements were submitted to DIA and did fully refute all the allegations – and they were ignored. In one of the most egregious rejections, they rejected the DSS senior special agent's written statement that she had investigated and refuted all negative allegations against me for the period 1995 and before.

4. Despite the Army "clearing me" of wrongdoing, and promoting me to lieutenant colonel, DIA accused me, in writing, of 'lying' to them about this fact; you now have the documents. Let it be stated for the record again today, the Army has taken no punitive legal action against me on these allegations and I was promoted, as scheduled, to lieutenant colonel. DIA security leadership continues to live in some parallel universe in which what they decree is so, no matter the facts of a given issue.

Chairman of the HASC, Congressman Duncan Hunter has requested, and DoD is now conducting, investigations regarding DIA's retaliation against me and other related investigations into the ABLE DANGER issue.

CONCLUSION

I became a whistleblower not out of choice, but out of necessity. Many of us have a personal commitment to the truth – and a commitment to defend the country, not by simply stating our loyalty, but by action; by going forward into combat if called upon to do so; by going forward to expose the truth and wrongdoing of government officials who before and after the 9/11 attacks failed to do their job.

I have suffered both public and private personal attacks – attacks that we cannot easily trace back to DIA, but suspect them as the origin.

There is no protection for whistleblowers – this needs to be corrected. The fact that DIA could use superficial, administrative issues, and then go back in my security file and resurrect favorably resolved issues demonstrates clearly, in my case, the willingness and ability of senior officials to abuse the system. Why do they do this? Because they can – there is no oversight on them or the process. There must be a mechanism instituted to allow Congress to receive critical information to support their oversight role. There must be accountability and, for those who engage in retaliation, punishment and removal.

An independent DoD Office of Inspector General that reports to Congress and not DoD leadership may be an answer.

While there is a need to legitimately hold individuals accountable who hold security clearances, the current system allows for too much subjectivity – and, as in my case, abuse. Independent checking mechanisms should be instituted. As part of the clearance process – a "must issue" standard should be prepared in which if a person has no criminal record or questionable associations, a clearance must be granted. Further, to account for and punish 'real' wrongdoing – should someone with a clearance be convicted for DUI or other minor offenses - there should be a system of defined, and impartial, penalties. A senior executive should receive the same penalty for a minor offense as a junior non commissioned officer guilty of the same issue.

Thank you. I will be happy to answer any questions you might have.

Mr. SHAYS. Thank you, Colonel, for your statement. Thank you both who have testified so far for your service to our military. And just to say that if you don't cover anything in your testimony, it is part of the record. Second, we are going to have extensive questioning of this panel, and you will be able to, I think, cover the points if you thought you left anything out.

Colonel SHAFFER. Thank you, sir.

Mr. SHAYS. Mr. German.

STATEMENT OF MICHAEL GERMAN

Mr. GERMAN. Thank you. My name is Michael German, and I am a former FBI special agent. Chairman Shays, Ranking Member Waxman, Ranking Member Kucinich, thanks for having this hearing, and thanks for inviting me to speak with you today.

Shortly after the September 11th attacks, FBI Director Robert Mueller made public statements urging FBI employees to report any problems that impeded FBI counterterrorism operations. He offered his personal assurance that retaliation against FBI whistleblowers would not be tolerated. I listened and obeyed the Director's orders. I reported misconduct in a terrorism case, through my chain of command, as directed. I did my duty. Unfortunately, Director Mueller did not uphold his end of the bargain. Retaliation was tolerated, accepted, and eventually successful in forcing me to leave the FBI.

I am here today to tell you about a system that is broken. The Department of Justice Inspector General's report on my case provides a rare post-September 11th glimpse into the dysfunctional management practices that continue to obstruct FBI counterterrorism operations and continue to allow FBI managers to retaliate against agents who report their misconduct. But the IG report is too little, too late. I am here not because I think you can help me. I am here because your action is needed to fix a broken system before another terrorism investigation is allowed to fail.

At the time I made my complaint, I had 14 years of experience as a special agent of the FBI. During my career I twice successfully infiltrated terrorist organizations, recovered dozens of illegal firearms and explosive devices, resolved unsolved bombings, and prevented acts of terrorism. I had an unblemished disciplinary record, a Medal of Valor from the Los Angeles Federal Bar Association, and a consistent record of superior performance appraisals.

In early 2002, I was asked to assist in a Tampa Division counterterrorism operation that started when a supporter of an international terrorist organization met with a leader of a domestic terrorist organization. This January 2002 meeting was recorded by an FBI cooperating witness as part of an ongoing FBI domestic terrorism investigation. I quickly became aware of deficiencies in the case, but informal efforts to get the case on track were met with indifference by FBI supervisors. In August 2002, I learned that part of the January meeting had been recorded illegally, in violation of Title III wiretap regulations.

When I brought this to the attention of the Orlando supervisor responsible for the investigation, he told me we were just going to pretend it did not happen. In 14 years as an FBI agent, I had never been asked to look the other way when I saw a violation of Federal

law. I reported this violation to my superiors, and that is when my journey in the labyrinth began.

Over the next 2 years, my complaint was passed from my ASAC to the Counterterrorism Division, to the Tampa Division SAC, to the FBI's Office of Professional Responsibility, to the Department of Justice's Inspector General, and to the FBI Inspection Division, none of whom actually initiated an investigation. Instead, FBI officials backdated, falsified, and materially altered FBI records in an attempt to cover up their mistakes.

Meanwhile, I was removed from one terrorism investigation, prevented from participating in a second terrorism investigation, and barred from training other agents in the undercover techniques that enabled me to infiltrate terrorist groups. Retaliatory investigations against me were pursued by FBI inspectors who refused to divulge the names of my accusers or document their interviews.

For 2 years, I worked within the system to try to get these deficiencies addressed, with no success. My career was effectively ended. When it became clear that no one would address this matter appropriately, I chose to report the matter to Congress and to resign from the FBI in protest. Only the public exposure of this matter finally compelled the IG to act. Last month, a full year and a half after I resigned, 3 years after my first formal complaint to the IG, and 4 years after these events took place, the IG finally issued a report of its investigation. That report confirms many of my original allegations: the Tampa Division terrorism case was not properly investigated or documented; the Tampa Division supervisors failed to address these deficiencies; the only effort Tampa Division made in response to an illegal wiretapping violation was to place the tape into the personal possession of the Orlando supervisor while Tampa managers officially denied that the recording existed. The IG found that Tampa officials backdated and falsified official FBI records in an attempt to obstruct the internal investigation of my complaint.

The IG report details a continuous collaborative effort to punish me for reporting misconduct by FBI managers, yet the IG only grudgingly admits that I was retaliated against. An Orlando supervisor justified removing me from one case because I unilaterally discussed the case with headquarters. A Portland SAC tells his staff that my participation in a second terrorism investigation is problematic because I was a whistleblower who requested to speak to Congress. The unit chief of the undercover unit tells his staff that I will never work undercover again, yet none of this is considered retaliation. Meanwhile, the FBI managers who backdated, falsified, and materially altered FBI records were given a pass. I hope you, as Members of Congress responsible for overseeing the Department of Justice, find this unacceptable.

In closing, my odyssey is a clear example of the need for greater congressional oversight of the FBI and the Department of Justice. The system is broken. It was broken before September 11th, and it has not been fixed. This is not a question of balancing security interests against liberty interests. It is a question of competence and accountability. Neither security nor civil liberties are protected when incompetent FBI managers can so easily falsify FBI records to cover up their misconduct.

I would request, in addition to my written statement to the committee, that my written response to the Inspector General's staff report be admitted as well.

Thank you.

[The prepared statement of Mr. German follows:]

Statement of Michael German, former Special Agent, Federal Bureau of Investigation, before the Subcommittee on National Security, Emerging Threats, and International Relations, February 14, 2006

Chairman Shays, Ranking Member Kucinich, members of the committee, thank you for inviting me to speak with you today. You have aptly named this hearing. I have indeed felt lost in a Labyrinth since I reported serious misconduct in an FBI Counterterrorism investigation four years ago. But there was nothing subtle about the retaliation against me.

At the time I made my complaint I had fourteen years of experience as a Special Agent of the FBI. During my career I twice successfully infiltrated terrorist organizations, recovered dozens of illegal firearms and explosive devices, resolved unsolved bombings, and prevented acts of terrorism by winning criminal convictions against would-be terrorists. I had an unblemished disciplinary record, a medal of valor from the Los Angeles Federal Bar Association and a consistent record of superior performance appraisals.

In early 2002 I was asked to assist in a Tampa Division counterterrorism investigation that started when a supporter of an International terrorist organization met with a leader of a domestic terrorist organization. This January 2002 meeting was recorded by an FBI Cooperating Witness as part of an ongoing FBI domestic terrorism investigation. From the beginning the case was hampered with administrative deficiencies. My informal efforts to get the case back on track were met with indifference by FBI Supervisors, both in Tampa and at Headquarters. In August of 2002 I learned that part of the January meeting had been recorded illegally, in violation of Title III wiretap regulations.

I reported this to the supervisor of the investigation, who informed me he wanted to just pretend it didn't happen. In fourteen years as an FBI agent I had never been asked to look the other way when I saw a violation of federal law. I reported the violation to my superiors, through my chain of command, as dictated by FBI policy. That's when my journey in the labyrinth began. My ASAC reported my complaint to the Assistant Director of the Counterterrorism Division and the SAC of the Tampa Division. The Counterterrorism Division reported it to the FBI's Office of Professional Responsibility, but OPR did not open an investigation.

The Tampa Division responded by immediately approving my undercover operation while simultaneously telling the case agent he was no longer allowed to speak to me. Tampa sent an e-mail to Headquarters promising to start an investigation into my complaint, and then provided the results of the investigation they had not yet started. Then they began backdating and falsifying FBI records.

About this time the Unit Chief of the Undercover Unit at Headquarters told his staff that I would never work undercover again.

I contacted the Assistant Director of the CTD to report that I was being retaliated against but I received no response. I called OPR but they refused to interview me. Finally I called the Department of Justice Inspector General's Office. They agreed to interview me, but when I advised OPR that OIG would interview me, OPR wanted to interview me instead. The OIG investigator said both offices would participate in the interview, and in December of 2002, three months after my complaint, I was finally interviewed by both OPR and OIG. Neither opened an investigation

In February of 2003 I made a second statement to OPR and OIG, regarding the false statements Tampa managers made after my complaint. This time I was told OPR would open an investigation. But then a month later, I was told the Inspection Division was taking the investigation away from OPR. Ironically this was done during a separate OIG investigation into allegations that OPR investigations against FBI managers were routinely taken away from OPR. The OIG later concluded it could find no investigations that had been taken away from OPR.

Meanwhile a second counterterrorism investigation I was assigned to in Portland, Oregon was being unnecessarily delayed. The new SAC in Portland, who happened to be the former OPR Assistant Director that refused to open an investigation into my original complaint, told the supervisor of the Portland undercover operation that my participation in the investigation was "problematic" because I was a whistleblower and because I had asked to speak to members of Congress. The undercover proposal sat at Headquarters for a year, but was never brought to the Review Committee for approval until my name was taken off it.

In December of 2003 I was told the Inspection Division report was finished, with no finding of misconduct among the Tampa supervisors. The

OIG investigator told me the OIG would not open an independent investigation. I asked for a written declination from OIG but instead, in January of 2004 I received a letter from the Office of Inspector General saying they would open an investigation, and that an agent would be contacting me shortly. By March of 2004 I had still not been contacted so I called the OIG again. In April of 2004 I was interviewed for a third time and a third sworn statement was taken. I was told this statement would again be evaluated to determine whether the OIG would proceed with an investigation. In May of 2004 I sent a letter to the Senate Judiciary Committee and the Senate Intelligence Committee and in June of 2004, I resigned from the FBI.

A year and a half later the OIG has finally finished its report.

The report confirms many of the allegations I made in my original complaint regarding the mismanagement of the Tampa terrorism investigation. The significant findings detailed in the report include:

1. The Tampa terrorism case was not properly investigated or documented.

2. That Tampa supervisors failed to effectively address investigative deficiencies in the case on a timely manner.

3. The only effort the Tampa Division made in response to notice of a Title III violation was to place the tape into the personal possession of the Orlando Supervisor responsible for the investigation.

4. The Tampa Division did not undertake a thorough investigation of my allegations.

5. The FBI Inspection Division investigation into my allegations found FBI managers deficient in handling this investigation, but made no recommendations to hold anyone responsible for those deficiencies.

6. Both the FBI Inspection Division and the FBI Office of Professional Responsibility failed to investigate my allegations that Tampa officials backdated and falsified official FBI records.

7. Tampa officials did backdate and falsify official FBI records.

8. The FBI retaliated against me for reporting official misconduct within the FBI.

These important findings demonstrate a dangerous lack of internal controls within the FBI.

One would think that after such facts were discovered there would be a strongly worded rebuke against the FBI, an agency whose success, after all, is entirely dependent on its reputation for integrity. This integrity was sorely undermined by FBI managers who used correction fluid to materially alter official FBI records in furtherance of a scheme to obstruct the internal investigation. One would think that an Inspector General charged with protecting the integrity of the FBI, and with protecting the whistle-blowers who bravely come forward to report these lapses, would stop at nothing to find out who so recklessly tarnished the image of the FBI, and so distracted us all from our critical mission of protecting the nation from terrorist threats.

One would think that, but in the maze I found myself in after making my complaint, this was just one more twisted path that put me back to where I started. In a final report that can only be described as schizophrenic, the Inspector General who made these findings repeatedly heaps praise on the FBI Supervisors and Inspectors who were responsible for this misconduct. The Inspector General finds that the Tampa Division failed to properly investigate and manage a terrorism investigation, and then backdated and falsified FBI records to obstruct the investigation into that failure, yet then describes these managers as "experienced terrorism investigators" and defends the conclusions reached in their admittedly deficient investigation of themselves. The Office of Professional Responsibility and the Inspection Division are likewise found to have not adequately investigated my complaint, yet they are also called "terrorism experts" and are reported to have been thorough and forthright in their analysis of the terrorism issues, despite their utter incompetence in all other aspects of the investigation, particularly their failure to notice that critical documents had been altered with white-out.

When I received a draft copy of the Inspector General's report last November, I was willing to attribute the many factual errors and omissions in the report to honest mistakes. I made a good faith effort to identify these errors so the Inspector General could produce a final report that comported

more closely to the well-documented facts. In his final report the Inspector General simply ignores the bulk of my response and instead adds new material that is equally as misleading and contradictory to common sense. The ridiculousness of the OIG response can be summed up by their warning to me not to identify the names of the terrorist organizations involved in the investigation they say did not involve terrorism.

Since this hearing is focused on security clearance retaliation I would like to concentrate attention on just one particularly troubling aspect of this debacle that demonstrates how national security agencies like the FBI manipulate the system to surreptitiously conduct retaliatory investigations against whistleblowers. This is critical, because without retaliatory investigations these agencies would not be able to gather the evidence necessary to justify revoking a security clearance.

After twice providing OPR and OIG with signed, sworn statements in which I alleged serious misconduct by FBI managers, I assumed both OPR and OIG would pursue investigations. Without notifying me, however, the FBI Inspection Division initiated a separate investigation that was not limited to my allegations- in fact the Inspectors were not even advised of my OPR statements when they conducted their investigation. Instead, in the words of one of the Inspector's quoted in the OIG report, they were instructed to "take a look at the whole thing." The "whole thing" of course included my conduct in the investigation, and since the subjects of my complaint all knew the Inspection Division investigation was taking place while I did not, I was at a severe disadvantage. The Tampa Division managers even acted as fact-finders for the inspection.

The Inspectors did initiate inquiries into my conduct during their investigation. They looked into allegations that one of my trips to Tampa lacked proper authorization and into allegations that I spent a small amount of case funds without authorization. Neither investigation bore fruit, but that's not the point. If the Inspectors had found something they would certainly have used it as justification for taking action against me, which they then could have argued was not related to my complaint.

If they had been up front and actually opened an internal investigation against me, it would have been an obvious act of retaliation. But by camouflaging the investigation as an all-encompassing "Inspection" they could mask their true intent and engage in one fishing expedition after

another until they finally got lucky. Since the OIG report concludes that the Inspection Division did not investigate my allegations of misconduct by Tampa managers, it begs the question: if they weren't investigating my complaint, what were they investigating? The Inspection Division was not trying to discover what went wrong in this investigation, they were trying to find something they could use against me.

Now this is where things get really troubling, and where the bad faith in the OIG investigation is demonstrated. In the draft report the OIG states that the Inspectors interviewing the Tampa officials "did not take written statements or document each interview." As I said, this allowed the Inspectors to conduct these retaliatory investigations without leaving a record. The Inspectors told me they pursued these investigations against me- I believe to intimidate me- and I requested that they document who made the allegations because the accusations evidenced retaliation. I also informed the OIG investigator soon afterward in a telephone call, and I documented the incident in a letter to the Chief Inspector. Despite my requests, the Inspection Division refused to provide the names of my accusers or document their investigation of these allegations.

In the OIG final report, however, the sentence quoted above is removed and replaced with a sentence stating: "In our examination of the Inspection Division review and interviews of the team, **the OIG found nothing** to indicate that the Inspection Division investigated German's travel authorizations, his handling of case funds, or any other aspect of his conduct." This alteration of the OIG report intentionally obscures the fact that the Inspectors deliberately chose not to document their investigative interviews, creating the misleading impression that such events did not take place. I documented the Inspector's inquiries in a timely manner and provided that information to the Chief Inspector, and to the OIG.

I wish I could say that now that the OIG report is complete I am out of the labyrinth, but I am not. In fact I'm back to square one. This matter now goes before the Department of Justice Office of Attorney Recruitment and Management for adjudication, only the OIG doesn't even give the OARM the full results of its investigation. Of the 52-page OIG final report, only 13 pages have been given to OARM. According to what I have been told, OARM will now act somewhat like an administrative law judge in a de novo review of this matter, where I will be placed in an adversarial position against the OIG. My supposed protector is now my adversary. In order to

present any evidence to the OARM I will have to request discovery, even though I gave all the records to the OIG three years ago. In order to obtain witness testimony I will have to request depositions, even though these witnesses have all given statements to the OIG. The OARM can deny my requests for discovery at its own discretion.

In closing, my odyssey is the clearest example possible of the need for greater Congressional oversight of the FBI and the Department of Justice. The OIG investigator once asked me why I thought the FBI managers were so brazen in the way they altered the records in this case. I told him it was because they knew no one would look, and even if someone did look, no one would care. The people responsible for this mess still work for the FBI, many in leadership positions, and that should leave all of you questioning the veracity of what you're being told about the FBI Counterterrorism program. This is not a question of balancing security interests against liberty interests. Neither our security nor our civil liberties are protected when FBI managers can so easily cover up their misconduct.

Thank you for your time.

[The response referred to follows:]

For the Record as part of German Testimony

Written Comments of Former FBI Special Agent Michael German in Response to the Department of Justice Office of Inspector General Draft Report into Retaliation for Making Protected Disclosures Against FBI Managers on September 10, 2002

I. INTRODUCTION

On November 16, 2005 I was provided with a draft copy of the Department of Justice Office of Inspector General's investigation regarding retaliation against me by FBI officials for reporting misconduct by FBI employees and mismanagement in a Counterterrorism investigation I was assigned to in March of 2002.

The report confirms many of the allegations I made in my original September 10, 2002 complaint regarding the mismanagement of the original investigation. The OIG report confirms that the FBI failed to properly respond to my complaint, and confirms the FBI retaliated against me for making a protected disclosure. The significant findings detailed in the report include:

1. The Orlando terrorism case was not properly investigated or documented.

2. That Orlando supervisors failed to effectively address investigative deficiencies in the case on a timely manner.

3. The only effort the Tampa Division made in response to notice of a Title III violation on a consensually recorded conversation between the subjects of the Orlando terrorism investigation and an FBI Cooperating Witness (CW) was to place the tape into the personal possession of the Orlando SSRA responsible for the investigation (the report indicates the OIG was satisfied with this response).

4. The Tampa Division did not undertake a thorough investigation into my allegations about the actions and inactions of individual agents and supervisors in the Tampa Division and the impact of their conduct on the Orlando case.

5. The FBI Inspection Division investigation into my allegations found FBI managers deficient in handling this investigation, but made no recommendations to hold them responsible for those deficiencies.

6. Both the FBI Inspection Division and the FBI Office of Professional Responsibility failed to investigate my allegations that Tampa officials backdated and falsified official FBI records.

7. Tampa officials did backdate and falsify official FBI records after my complaint.

8. The FBI retaliated against me for reporting official misconduct within the FBI.

These are important findings that demonstrate a dangerous lack of internal controls within the FBI that calls the integrity of every FBI investigation into question. The Administration, Congress and the American public should be gravely concerned about these findings under the current national security threat situation when the leadership and integrity of the FBI is so critical to protecting our nation and protecting our civil liberties.

I appreciate the hard work of the OIG investigator who uncovered this disturbing pattern of deceit and deception, and I applaud those FBI employees who had the courage to tell the truth even though, as this report amply demonstrates, telling the truth about malfeasance in FBI management can seriously endanger a career in the FBI. This report will give Congress and the public a rare opportunity to assess the performance of the FBI more than four years after the post-9/11 reforms have been in effect.

What the OIG report doesn't mention, however, is that I reported these deficiencies directly to the OIG in December of 2002, while there was still time to correct them and salvage the investigation. The OIG took no action to either address the deficiencies or to protect me from the retaliation it finally acknowledges three years later. The failure of the OIG to properly address this matter and to protect me from retaliation compelled me to resign from the FBI in order to bring this case to the attention of members of Congress and the American public, and only that public pressure compelled the OIG to act.

I appreciate the challenge OIG investigators faced in trying to coherently present the details of a multi-faceted investigation spanning such a large period of time, but their process of separating out different aspects of the investigation and analyzing them individually in this report materially distorts the sequence of events and obscures the collusion between the parties, leading to erroneous OIG conclusions on several aspects of their analysis of FBI misconduct in this matter.

There are also several misstatements and omissions of fact that directly impact other OIG conclusions. I will address those misstatements and omissions in detail below.

But the most troubling aspect of the OIG investigation is the refusal to critically review the veracity of the FBI's conclusion that the subjects of the Orlando investigation have no credible links to terrorism. This conclusion is directly contradicted by the investigative record, by taped conversations and by an extraordinary amount of evidence available in FBI indices, which I provided to the OIG in December 2002 and February 2003. The OIG refused to independently investigate the terrorism aspect of the investigation and instead chose to accept the results of the FBI Tampa Division and FBI Inspection Division investigations, despite finding those investigations deficient in all other respects.

The OIG report exposes a concerted effort by FBI managers to conceal what happened in this investigation, yet the OIG intentionally ignores what is the most obvious

motive for this behavior- an institutional interest in concealing continuing failures in the FBI Counterterrorism program while Congress was debating whether to dismantle the FBI.

In a November 17, 2005 telephone conference call with a representative of the OIG General Counsel's Office it was suggested that whether there was a terrorism link in the FBI investigation was irrelevant to the OIG investigation into retaliation against me, but I beg to differ. I yelled "fire" in a crowded theater and both the reasonableness of my actions and the reasonableness of the response from FBI managers is entirely dependent on whether there actually was a fire. The OIG instead chose to blindly accept the FBI conclusion that there was no fire, even though every other aspect of the FBI internal investigation into this matter was determined to be inadequate. The refusal to undertake an independent review of FBI files regarding the links to terrorism seriously undermines the integrity of this OIG report. More importantly, however, the OIG refusal to look at the evidence directly affects the national security of the United States and our allies. The failure of the OIG and the FBI to adequately address a national security matter demonstrates the critical need for greater Congressional and public oversight of the Department of Justice.

II. MISSTATEMENTS AND OMMISSIONS OF FACT IN THE OIG REPORT

CAVEAT:

My ability to respond to the OIG report is handicapped in two important respects, which I would like to make clear from the outset.

First, because I resigned from the FBI I no longer have access to the case file and other FBI and DOJ records which support my statements. I therefore have to rely entirely on my memory to reconstruct events for this statement. If I misstate the date or substance of a document or event referred to in this response it is due to my lack of access to the records rather than any intention to deceive. I should also point out that I never had access to all the records. I never saw the falsified FD-472 and FD-473 attached to Tampa's February EC, for instance, and I was not advised of the status or results of the FBI Inspection Division investigation regarding my allegations until the day before I briefed Congressional staff about this matter in May of 2004.

The second caveat is more complex. Although the FBI continues to insist that their Tampa Division and FBI Inspection Division reviews of the Orlando investigation established no link to terrorism, and the OIG has accepted those conclusions, I have been instructed by both the FBI and the OIG that for reasons of national security I should refrain from mentioning the names of the terrorist groups involved in the Orlando investigation. This instruction exposes the absurdity of the FBI's position that there are no links to terrorism in this investigation. Both main subjects of the Orlando terrorism investigation were subjects of previous FBI terrorism investigations and one was referenced in the files of numerous terrorism investigations that took place before, during and after the Orlando terrorism investigation.

I am in the unenviable position of being forbidden to release or describe evidence the FBI refuses to admit exists, and despite having provided that evidence directly to the OIG, they have consistently refused to critically examine that material and independently assess the veracity of the conclusions reached in the internal FBI investigations. I was never given an adequate explanation for why the OIG refused to investigate the veracity of the FBI conclusion that these subjects were not linked to terrorism.

The Orlando investigation was originally a criminal matter, which did not involve classified information. Some of the material I compiled from FBI indices at the direction of the Counterterrorism Division to demonstrate the FBI intelligence linking the primary subject to terrorist organizations was classified. I was later told some of the original material was retroactively classified, but I have no official confirmation of this, nor do I know exactly what information has been re-classified.

In May of 2004, while I was still employed by the FBI, I met with Congressional staff from the Senate Judiciary Committee and the Senate Intelligence Committee to provide an unclassified briefing regarding this matter. I received a briefing from FBI Congressional Affairs attorney Beth Beers regarding what I could and could not reveal to

Congressional staff in an unclassified setting. Ms. Beers accompanied me to the briefing and I asked her to warn me if the discussion strayed into an area she felt I should not discuss. Ms Beers did not raise any concerns during or after the briefing which would indicate that I revealed anything inappropriate. I will use Ms. Beers' directions as a guide to the preparation of this statement and any future comments I make to Congress.

In particular I was told that although I should not name the terrorist groups involved in the Orlando investigation I could describe them generally as a right-wing extremist group and an overseas Islamic terrorist organization. I was told I could refer generally to the ideological nature of the terrorist organization involved in the Portland investigation as well, but I will only refer to the Portland group as a high-priority domestic terrorist organization. All three terrorist groups are well known and have long histories of involvement in terrorism.

THE CONTEXT

None of the behavior documented in the OIG report can be fully understood unless it is put in context with events taking place at the time. The dysfunction in the FBI's counterterrorism program prior to September 11, 2001 is well documented. As a result of this dysfunction FBI field agents and managers often sought to circumvent the odious bureaucratic challenges involved with terrorism investigations by opening cases involving suspected terrorists under criminal classifications appropriate to the illegal activities the terrorist groups were involved in rather than as terrorism investigations. I am aware of cases against terrorism suspects that were opened as drug investigations, organized crime investigations and stolen property investigations, among others. This became even more of a problem after 9/11 due to the disarray resulting from the restructuring of the FBI Counterterrorism Division and the massive backlog of leads following the 9/11 attacks. FBI Headquarters was aware of this problem and sent several communications to the field demanding field office managers identify and reclassify these investigations promptly.

By early 2002 there were increasing public demands for an independent investigation of the intelligence failures that led to 9/11, and a joint House-Senate Intelligence Committee investigation was underway. In May of 2002 a letter from Minneapolis FBI agent Coleen Rowley detailing investigative and managerial failures in the Moussaoui investigation was leaked to the press and there was a public debate about dismantling the FBI. The fear at FBI Headquarters was expressed to me by a Counterterrorism Division Section Chief who opined that we might all end up carrying Department of Homeland Security badges.

THE ORLANDO TERRORISM INVESTIGATION TIMELINE

The manner in which material is presented in the OIG report obscures the sequence of events in ways that materially affect some of the OIG conclusions, so I will briefly set out the correct sequence of events.

In late February or early March of 2002 I received a phone call requesting my assistance in a Tampa Division domestic terrorism investigation. The investigation was opened in February of 2002 based on a consensually recorded conversation between an FBI Cooperating Witness (CW), a supporter of an overseas Islamic terrorist organization (Subject #1), and a member of a right-wing extremist group (Subject #2) which took place on January 23, 2002. The CW had been employed by the FBI months earlier to assist in an investigation of Subject #2's domestic terrorist group and had been consensually recording meetings with the domestic terrorism subjects at the direction of the FBI. After the January23, 2002 meeting a separate domestic terrorism investigation was opened with a February 8, 2002 Tampa Division Electronic Communication to the Domestic Terrorism Unit at FBI Headquarters. I was told the CW was well known to the Tampa Division, and had provided reliable information to the FBI in relation to previous FBI investigations.

Contrary to what is implied in the OIG report, a contemporaneous account of the January 23, 2002 meeting was documented in the February 8, 2002 EC from Tampa Division to the Domestic Terrorism Unit reporting the opening of the new investigation. This account of the meeting identifies the terrorist organizations by name, and identifies the purpose of the meeting as an attempt by the supporter of an overseas Islamic terrorist group to elicit logistical support from the domestic terrorist group in moving money overseas for the benefit of the Islamic terrorist group. I believe this February 2002 EC clearly states that the meeting was recorded. To summarize the results of a meeting in EC form rather than in an FD-302 investigative report is unusual in a criminal domestic terrorism investigation, but is the preferred method of documenting such information in an international terrorism or counter-intelligence investigation, which may explain why it was done this way. Also, if the tape was immediately being sent for transcription, creating a summary FD-302 may have been considered unnecessary.

The CW provided the Orlando terrorism case agent with the recording he made of the January 23, 2002 meeting. The CW later told me that he asked the Orlando terrorism case agent to promptly transcribe the recording so CW could learn what took place during a portion of the meeting when he was out of the room (hence my discovery of the Title III violation). There are two documented facts that corroborate the CW's account of this event. First, a transcript of the recording was made, which is unusual because the normal FBI practice is to wait to transcribe tapes until the conclusion of an investigation. I do not know when this transcript was produced but I received a copy of the transcript from the Orlando drug investigation case agent via a FedEx delivery long before I wrote the September 10, 2002 letter. The second event that corroborates the CW's account is the discovery that the FD-472 and FD-473 which were later altered were originally dated in March 1, 2002, which is consistent with the CW's not having been admonished regarding

the proper use of consensual monitoring equipment until after the January 23, 2002 meeting.

The fact that I possessed a copy of the transcript before my September 10, 2002 letter contradicts statements in the OIG report that the tape was not listened to or transcribed by the Tampa Division until after my letter was released. This also raises a question as to whether Tampa Division produced a second version of the transcript after the September 10, 2002 letter, which may explain why the FBI Inspection Division concluded no terrorism was discussed in the meeting. I provided copies of the pre-September 10, 2002 transcript to both OPR and OIG in February of 2003, in response to the December 2002 Tampa EC that falsely claimed the meeting was not recorded. The transcript I had did not appear to be complete, but the substance of the conversation documented in the transcript supports the contemporaneous account of the meeting documented in the February 8, 2002 Tampa EC.

The transcript makes clear that:

- The meetings between these groups were initiated by Subject #1 in response to an anti-Semitic flyer produced by the right-wing extremist group.

- Although the January 23, 2002 meeting was the first meeting between Subject #1 and Subject #2, this was not the first meeting between Subject #1 and a representative of the right-wing extremist group represented by Subject #2. Both subjects independently describe the previous contacts in detail in the January 23, 2002 transcript.

- The January 23, 2002 meeting was the first time CW met Subject #1.

- The CW was unaware of the previous meetings and played a passive role in the January 23, 2002 meeting.

(These facts contradict the Tampa Division's later claims that the CW was the driving force behind these meetings).

In addition, the transcript clearly documents that the purpose of the meeting was to explore an agreement to cooperate toward the common goals of both terrorist groups, to wit:

- The subjects discussed their shared hatred of Jews and a shared desire to kill Jews.

- The subjects exchanged literature detailing "lone wolf" terrorist tactics.

- The subjects discussed the difficulties they were having as a result of the increased post-9/11 counterterrorism security environment.

I believe that the names of both terrorist groups were mentioned during the meeting, but I am not certain of this without having reviewed the transcript in some time. The founder of one of the terrorist groups is discussed in detail, and a very famous terrorist manual is discussed.

A March 2002 Tampa EC requested that I travel to the Tampa Division to assist in the investigation, and it was during this trip that I became aware of the administrative problems with the case and the failure of the Orlando terrorism case agent to perform an indices check. The window of opportunity to initiate an undercover operation is very small and the passage of time between the January meeting and the March meeting was already problematic. The CW had been tasked by the subjects to perform certain duties, but the failure of the FBI to respond in a timely manner to initiate an undercover operation left the CW unable to accomplish the tasks as directed. This was creating friction between the subjects and the CW. I advised Tampa Division to expedite a Group I undercover operation (UCO) proposal coordinated with both the Domestic Terrorism Unit and one of the International Terrorism Units.

Upon my return to Atlanta I began to perform my own indices checks with the assistance of another Atlanta Special Agent. We found numerous references to Subject #1 in previous and ongoing FBI terrorism investigations and FBI criminal investigations, which were all consistent as to the name of the international terrorist organization Subject #1 supported as well as the types of support Subject #1 provided to that organization. These reports came from multiple sources over an extended period of time. I provided this information to agents and supervisors at FBI Tampa and to CTD at Headquarters.

Of particular importance were reports from an FBI confidential informant (CI) received by the Tampa Division approximately a year before the Orlando terrorism investigation was opened. The information was consistent with the information provided by the CW as to the name of the terrorist organization Subject #1 was affiliated with and the type of support that Subject #1 was providing to that organization. In addition to other information, the CI alleged Subject #1 was presently involved in supporting terrorists who were inside the United States. This information was documented in FBI files under an organized crime classification rather than a terrorism classification. An unrelated FBI drug investigation was opened by the Tampa Division based on information provided by this CI, and the CI was deemed by FBI Tampa to be "reliable," according to the documents. No action was taken on the CI's terrorism allegations.

My present recollection is that the terrorism-related information reported by this CI was included in the Orlando terrorism undercover operation proposal submitted to the Domestic Terrorism Unit in April of 2002, but I am not certain of this. It may have been included only in later proposals, or not at all, but I know the Orlando case agents and supervisors were aware of this information. I also included this CI's information in my September 10, 2002 letter to my ASAC.

In April of 2002 a Tampa Group I Undercover Operation (UCO) proposal was approved by the Tampa Division and submitted to the Domestic Terrorism Unit at

Headquarters for approval. This proposal recounted the summary of the January 23, 2002 meeting between a member of a right-wing extremist group and a supporter of an overseas Islamic terrorist organization. The proposal described the CW as "reliable." The DTU refused to support the proposal, as stated in the OIG report, but not for the reason indicated in the OIG report. The OIG report obscures the fact that the proposal was directed to the DTU by referring to this as a submission to FBI Headquarters, and states the proposal was not supported due to the lack of a sufficient connection to terrorism. My recollection is that the DTU refusal to support the proposal was based on their assessment that the international terrorism aspect of the investigation was more prominent and therefore DTU advised Tampa to coordinate the proposal with one of the International Terrorism Units at Headquarters. I believe this assessment was documented in an E-mail from DTU to Tampa in April or March of 2002, and again in the CTD EC to Tampa and OPR on October 15, 2002. I should also note that although this proposal was submitted to the DTU, it was written by the Orlando drug investigation case agent, and included the parallel drug investigation aspect of the operation in the proposal.

I am not aware of any attempt by Tampa Division to bring this proposal to the attention of any of the International Terrorism Units. The proposal languished until May of 2002, when it was resubmitted to the Tampa Division undercover review committee. A Tampa Division memo to the file quotes a Tampa ASAC ordering the removal of all terrorism references from the proposal. Much of the terrorism information was redacted, but my role and my proposed activities in relation to the operation remained the same. I believe there were still many references to providing support to overseas terrorist organizations in the later version of the proposal and I believe the proposal still included an account of the January 23, 2002 meeting which was consistent with the February 2002 Tampa EC.

By this time the CW's relationship with Subject #2 had completely soured due to CW's inability to accomplish assigned tasks. CW was still in contact with Subject #1 occasionally, but these meetings were increasingly awkward due to the delays in implementing the UCO. The window of opportunity was closing fast.

In May of 2002 CTD contacted Tampa Division and asked if it was aware of international terrorism subjects interacting with domestic terrorism subjects. Tampa responded negatively. At this time the only information in the Tampa file regarding the terrorism investigation was the February 2002 opening EC, the Group I UCO proposal submitted to DTU and the transcript of the January 23, 2002 meeting, all of which indicated that the meetings between domestic and international terrorists did occur. The Tampa internal investigation that discounted the terrorism links in the Orlando investigation would not get started until after my September 10, 2002 letter, some four months later. In June of 2002 the Group I UCO proposal was submitted to one of the Drug Units at Headquarters, but it was obvious in the face of the proposal that the drug aspect to the investigation was only a small part of the operation and would use only a fraction of the funds that the terrorism aspect of the investigation would use. The Group I UCO proposal was not supported by the Drug Unit at Headquarters.

Headquarters then recommended Tampa open a Group II UCO, which can be initiated under the authority of a field office Special Agent in Charge, but receives no funding from Headquarters. The budget for the terrorism aspect of the proposal was substantially higher than could be expended under Group II authority, and I knew that even if the budget was reduced to Group II levels, such funding would not be available in a small office's budget in the last quarter of the fiscal year, which would delay the investigation until after September.

The CW continued to interact with Subject #1 but remained unable to accomplish assigned tasks due to the delay in approving the UCO.

In July 2002 Tampa Division was again questioned about any knowledge of international terrorism subjects meeting with domestic terrorism subjects, and the CTD supervisor making the inquiry specifically asked about the Orlando terrorism investigation, which remained open and classified as a domestic terrorism investigation. Again Tampa Division denied such a link despite the fact that the only information available in the files indicated otherwise, as did the transcript of the January 23, 2002 meeting.

In August of 2002 I traveled to Tampa Division in furtherance of the terrorism aspect of the investigation, although the Group II proposal had still not been approved. This is when I learned of the Title III violation. I asked the Tampa drug case agent to contact the United States Attorney's Office for advice in how to handle the violation since the tape had already been listened to by FBI employees and transcribed.

I returned to Atlanta and several days to a week later I was informed by the Orlando case agent that the AUSA advised him to just to segregate the tape from case materials and not use it. I knew this was not the proper legal procedure for handling a Title III violation and I called the Orlando SSRA to advise him the Title III violation was a serious matter that had to be dealt with immediately. The Orlando SSRA advised that they were going to just pretend it didn't happen and move forward in the investigation without documenting the previous investigative activity. I contacted my ASAC and he requested the information which I detailed in the September 10, 2002 letter. He sent the letter to the Tampa SAC and CTD AD. Within days of receiving the September 10, 2002 letter the Tampa Group II UCO was approved with an enhancement of funds provided from USOU. The approved UCO was forwarded to USOU via a Tampa Division EC. I was listed as the undercover agent on the approved Group II UCO, and I prepared with the case agent to move forward on the investigation.

Information provided by the CW was included in the proposal along with a Tampa Division assessment that the CW was "reliable." I believe information provided by the CI was also in the proposal, and the CI was also deemed "reliable," but I cannot be certain without reviewing the proposal (I know CI was deemed "reliable" when CI's information was used to open the unrelated drug investigation). In any case, I later learned that, contemporaneous with the Group II approval, the Tampa Division ASAC sent an e-mail to the CTD AD that contradicted the previous assessments of the CW and

the CI and now called their information "unreliable" for the first time. I believe this e-mail also called my motivations into question, even though the ASAC did acknowledge the problems I identified in the investigation were valid. In this e-mail the Tampa ASAC stated that Subject #1 was known to Tampa Division as a "common criminal" but denied there had ever been any indication that he was a terrorist threat to the United States. This e-mail preceded the Tampa Division investigation into my complaint, but somehow predicted exactly results of the Tampa Division investigation. When the Tampa ASAC's e-mail was written, shortly after my September 10, 2002 letter, those conclusions were directly contradicted by every piece of information then included in the Orlando terrorism investigation case file, by numerous reports in FBI indices, by the Group II proposal that the ASAC had just approved and by the transcript of the January 23, 2002 meeting.

The case agent called me a few days later and said that as a result of my letter the Orlando SSRA ordered him not to have contact with me. A short time later the Orlando SSRA called my supervisor and told him to advise me not to contact the Tampa Division.

In late September and October of 2002 I began noticing backdated reports being uploaded into the electronic file of the Orlando terrorism investigation. An FD-302 was written which purported to document the January 23, 2002 meeting. This FD-302, which I believe was dated in October 2002, reported that the CW did not bring a recorder into the meeting and that the meeting was not recorded. The October FD-302 recounted a version of what transpired in the meeting that contradicted both the February 2002 Tampa EC summarizing the meeting based on the CW's oral representation and the transcript of the meeting based on the tape recording of the meeting. I believe this FD-302 was written by a Tampa Division agent who had not previously been involved in the investigation. If this version of events conflicted with the CW's oral version of the meeting, and was not based on a recording of the meeting, where could it have come from? A subsequent FD-302 written by the Tampa drug case agent also purported to summarize the January 23, 2002 meeting. This version was unclear as to whether the meeting was recorded but simply stated that no terrorism was discussed in the meeting.

An October 16, 2002 Tampa Division EC written by the Orlando SSRA sets out the results of the Tampa Division investigation into my allegations. This EC includes summarizes of the later accounts of the January 23, 2002 meeting and later meetings between the CW and Subject #1 and Subject #2 (some of which mention extremist group activity) but not the accounts in the February 2002 EC or the transcript. The conclusion paragraph at the end of this EC actually contradicts material in the body of the very same EC. The conclusion states no evidence was found to link the subjects to terrorism but the body of the EC, which includes summaries of the meetings, details that extremist group activity is discussed in some meetings.

The December 2002 Tampa Division EC written by the new Tampa ASAC falsely states the January 23, 2002 meeting was not recorded and again recounts the October FD-302 version of the meeting. If this EC was actually written from a review of the case file, as the ASAC later stated, the ASAC would have had to ignore the contemporaneous account of the meeting presented in the February 2002 EC opening the investigation, the

account of the meeting presented in the Group I UCO proposal submitted to DTU, the version in the Group I proposal submitted to the Drug Unit, the version in the Group II proposal approved by the Tampa Division, the transcript of the meeting and my September 10, 2002 letter, in favor of the version of the meeting documented in two FD-302's written after my September 10, 2002 letter.

I was advised of this December 2002 EC by the OIG in late January of 2003. I provided a copy of the transcript to OPR and the OIG in February of 2003, and the Tampa ASAC responded the same day with a "correction" EC which stated the January 23, 2002 meeting was indeed recorded. But the ASAC maintained the veracity of the concocted version of events documented in the October FD-302, despite the fact this account was contradicted by the transcript. The FBI has maintained the veracity of the October FD-302 version of the meeting ever since, and the OIG has refused to review those conclusions.

The Group II drug UCO approved by the Tampa Division in September of 2002 expired in March of 2003. According to the Tampa drug investigation case agent, no investigative activity took place regarding either the terrorism aspect of this investigation or the drug aspect of the investigation. To date, Subject #1, who the Tampa ASAC described as "well-known" to the Tampa Division as a "common criminal" remains at large.

Although the Tampa Division repeatedly referred to the "unreliability" of the CW in communications to Headquarters after my September 10, 2002 letter, the CW continued to be tasked by Tampa Division to meet with Subject #1 until at least January of 2003, when I reported this to OPR. I believe the CW later worked for another Division of the FBI throughout 2003, which would have required the concurrence of Tampa Division, according to FBI policy. This fact should have been taken into account by OIG when evaluating the FBI's repeated statements blaming CW for "embellishing" his accounts of the meetings and improperly "driving" the investigation.

On August 12, 2004 the FBI issued a press release calling my allegations "untrue." The press release stated that, "an exhaustive investigation and review of available evidence found no information to support allegations that the subject was involved in terrorism or terrorist funding, nor was there an apparent link between a domestic terrorist organization and an international terrorist organization." The falsity of this libelous statement is demonstrated by the transcript of the January 23, 2002 meeting and the numerous references in FBI indices linking the subjects of the Orlando terrorism investigation to previous and current FBI counterterrorism investigations. The press release also states that "a review of consensual recordings of the informant in this case clearly indicates that the informant exaggerated what took place at certain meetings." This also is a false statement based on the veracity of the version of events concocted in the October 2002 FD-302. The falsity of this statement is demonstrated by the transcript of the January 23, 2002 meeting. I reported these false public statements by a federal agency to the OIG, but the OIG refused to open an investigation and refused to provide a written statement declining to investigate the matter.

ANALYSIS OF THE OIG REPORT BY SECTION:

I. INTRODUCTION

The first paragraph of the introduction to the OIG report refers to the Orlando investigation as an operation, ...that German *believed* could uncover a terrorism financing plot... (my italics). I believe the use of the phrase "German believed," which is repeated throughout the OIG report when referencing the terrorism investigation, is misleading because it seems to indicate I was the only one who held this belief, or somehow was unreasonable in holding this belief. I conducted no independent investigation of these subjects or their meetings, I produced virtually no investigative material relevant to this investigation and I did not write the UCO proposals. Any information I had regarding the Orlando terrorism investigation and the subjects of the Orlando terrorism investigation came directly from FBI files, Tampa Division supervisors and Tampa Division agents.

The Orlando case was duly approved as a domestic terrorism investigation by FBI Tampa and the FBI Counterterrorism Division at Headquarters in February of 2002. I was asked to assist Tampa with the terrorism investigation in March of 2002, well after the case was opened and classified as a terrorism investigation. I was called because of my expertise in working undercover in terrorism investigations. I have never worked undercover in a drug investigation and a document I submitted to the Undercover Sensitive Operations Unit during my initial training indicated I would not be willing to work undercover in a drug investigation.

My role in the Orlando investigation was to portray a terrorist. The terrorism investigation I was assigned to, as stated in the OIG report, involved an alleged conspiracy to launder illegal proceeds outside of the United States and direct the money to terrorists. The original UCO proposal, which was written by Tampa agents and approved by Tampa managers, was submitted to the Domestic Terrorism Unit in April of 2002. Contrary to the manner in which it is portrayed in the OIG report, the Domestic Terrorism Unit recommended that Tampa submit the proposal to one of the International Terrorism Units, as the International Terrorism aspect was more prominent than the Domestic Terrorism aspect. When the terrorism investigation was folded into the drug investigation in a later proposal, the dual aspects of the investigation did not merge, but rather remained separate and distinct. My role remained the same and the operational plan for the terrorism aspect of the investigation remained the same.

There were several terrorism investigations involving these identical subjects before, during and after my involvement in the Orlando investigation. That the Orlando terrorism investigation was later determined to not be "viable" was a direct result of the errors and omissions of the FBI in pursuing the investigation, which were the subject of my original complaint. **I object to the report's repeated references to my holding a "belief" that there was a terrorism case because there was a terrorism case opened and approved by the FBI throughout the course of my involvement in this investigation.**

II. BACKGROUND
B. THE ORLANDO INVESTIGATION

Statement in the third paragraph that the Group I UCO proposal was sent to "FBI Headquarters" is misleading. As discussed in the timeline of the investigation, the proposal was sent to the Domestic Terrorism Unit and their reason for rejecting it was not a lack of terrorism but rather the prominence of the international terrorism aspect of the investigation. The proposal was never sent to any International Terrorism Unit.

The statement in the fourth paragraph that ...the Tampa Division opted to pursue the investigation as a drug investigation and be alert for any terrorism-related issues involving the subjects in the drug investigation, but no such issues have yet developed... is misleading because neither the drug nor the terrorism aspect of the investigation moved forward. The Group II undercover operation was allowed to expire in March 2003 with no operational activity having taken place, according to the Orlando drug case agent.

D. THE FBI'S REVIEW OF GERMAN'S ALLEGATIONS

The fourth paragraph statement that ...[German] expected OPR to initiate an investigation into the misconduct he cited... is true, but I was also told by an OIG investigator that OIG issued a "written finding" that required OPR to open an investigation and report the results of that investigation to OIG within 90 days. I do not know if this is true but this is why I expected OPR to initiate an investigation.

E. OIG INVESTIGATIONS

The final sentence of this section ...In our investigations and examination *of the two FBI reviews*, we did not find evidence to undermine the conclusion of these reviews... (my italics) is carefully worded, but misleading. This statement is often repeated throughout the report with minor word variation. A casual reader may believe based on this statement that OIG critically examined the FBI reviews and compared information cited in the reviews with other evidence I provided to the OIG, but that would be incorrect. The OIG conducted no investigation challenging the FBI conclusions that there was no link to terrorism in the Orlando terrorism investigation. I provided the OIG with the February 2002 Tampa EC to the DTU, a copy of the transcript of the January 23, 2002 meeting, the reports of information provided by the Tampa CI, the Group I UCO proposals and an EC I wrote in December of 2003 documenting the numerous indices references to Subject #1 in FBI terrorism cases past and present.

The sentence should read ...OIG conducted no independent investigation challenging the conclusion reached in the FBI reviews that the subjects of the Orlando investigation were not linked to terrorism...

IV. GERMAN'S ALLEGATIONS
A. 1. ALLEGATION THAT ORLANDO TERRORISM INVESTIGATION NOT PROPERLY INVESTIGATED AND DOCUMENTED

In the fourth paragraph (page 8) states ...the recording for the key meeting ...[was] not documented or transcribed until after the Tampa Division had received German's September 2002 letter... This statement is in error because the key January 23, 2002 meeting was summarized and documented in the February 8, 2002 Tampa EC to DTU, the April Group I UCO, and the recording of the meeting was transcribed and in my possession prior to my September 10, 2002 letter.

I would again request that the copy of the transcript I provided to OIG in February of 2003 be compared with any other transcript which may have been created by the Tampa Division after my September 10, 2002 letter. In light of the OIG's discovery of Tampa Division's intentional falsification of official FBI records relating to the recording of this meeting, and the unusual handling of the tape recording itself, I would also request an analysis of the tape to determine if it has been manipulated to no longer conform with the original transcript.

A similar statement in the seventh paragraph (page 8) ...no contemporaneous documentation of the meeting was made... is incorrect as well. The February 2002 EC was a contemporaneous documentation of the meeting, as was the transcript of the recording. The April Group I UCO proposal also documents the substance of the January 23, 2003 meeting. The only documents available in the Orlando case file when those statements were made indicated the meeting between a domestic terrorist group and an international terrorist group did occur. All of the documents stating otherwise were created after my September 10, 2002 letter. **These facts should force the OIG to revisit their conclusions regarding the numerous false statements made by Tampa Division in denying the meeting between domestic terrorists and a supporter of an international terrorist group and in denying any evidence linked these subject to terrorism.**

In the eighth paragraph (page 9) there is a reference to the lack of an indices search at the initiation of the investigation. While the indices search would have revealed the ongoing drug investigation involving Subject #1, as noted in the OIG report, it also would have revealed multiple references to Subject #1 in a multitude of FBI terrorism investigations, as well as numerous reference in other criminal investigations and reports from confidential informants, and anonymous callers. All of the references were consistent as to the name of the terrorist group to which Subject #1 was affiliated and the type of support Subject #1 provided to the terrorist organization. When I provided this material to the Section Chiefs in CTD they asked me to summarize how I found the material in ACS in one EC, which I completed in December of 2002. As the OIG found, that EC was completely ignored by CTD and no action was taken on the information.

In the ninth paragraph (page 9) the date of my September 10, 2002 letter should make it clear that these leads were not covered until after my letter criticizing their failure to cover the leads, which is obscured by the absence of the date of my letter.

In paragraph ten (page 9) there is the statement that ...Tampa Division did not have timely information concerning (a) the key meeting between the informant and the main subject, which showed that there was not a viable terrorism case... In fact there was timely information concerning the key meeting, including incontrovertible evidence in the form of a tape and transcript of that meeting that showed there was a viable terrorism investigation. There was a contemporaneous account of the meeting in the February 8, 2002 EC to DTU. In fact all of the information indicating there was not a viable terrorism investigation was created after my September 10, 2002 letter. Those accounts, originally made in the October FD-302, are contradicted by the mere existence of the transcript, and by the content of the conversation documented in the transcript.

The last line of paragraph eleven (page 10) ...In our investigation and examination of the two FBI reviews, we did not find evidence to undermine the conclusions of these reviews... is more misleading than earlier versions of this statement. "In our investigation" would include the OIG presence at the two OPR interviews in which I provided the OIG with incontrovertible evidence that proves these conclusions false, including the transcript of the meeting and the numerous references in FBI indices documented in my December 2002 EC to CTD.

2. ALLEGATION THAT SUPERVISORS IN THE TAMPA DIVISION MISMANAGED THE TERRORISM INVESTIGATION

In paragraph six (page 11) the report makes reference to ...the supervisor who German alleged had mentioned the desire to forgo documenting past investigative actions and simply document the case from that time forward... The supervisor does not deny making the statement. [This supervisor is also described later in the OIG report as "the Orlando SSRA"]

If the OIG examined what this supervisor did with the tape recording of the critical January 23, 2002 meeting during the time Tampa Division was denying it existed, it would be apparent that my version of the conversation, that the supervisor said they were going to pretend it didn't happen, aligns more closely to what actually happened after Tampa received my September 10, 2002 letter. After my letter Tampa Division created an October FD-302 that falsely stated the meeting was not recorded and then concocted a version of the meeting that conflicts with CW's oral account and the transcript of that meeting. If I did not have a copy of that transcript before writing the September 10, 2002 letter, Tampa Division would still be pretending the meeting was not recorded. I would remind the OIG that after I brought the transcript to OPR, the tape of the January 23, 2002 meeting was found in this same supervisor's desk, according to the OPR Unit Chief (which is consistent with later statements in the OIG report that the Tampa drug case agent gave the tape to his supervisor). I will discuss these events in greater detail in the section detailing the Title III violation.

1. INADEQUATE RESPONSE BY THE TAMPA DIVISION
a. TAMPA DIVISION REVIEW OF ORLANDO CASE

A footnote on page 12 of the OIG report references a CTD EC to Tampa detailing CTD's actions with regard to this investigation. This EC was also directed to OPR (which was OPR's first notice of my allegations regarding this investigation) calling my allegations "serious" (or words to that effect) and suggesting the material be reviewed for possible disciplinary action. OPR did not open an investigation based on this EC. An OIG investigator later showed me a copy of this EC with OPR Assistant Director Robert Jordan's hand-written notation to the effect, "I see no allegation of misconduct." This explains why no OPR investigation of the serious violations I reported was undertaken.

Not stated in the OIG report is that after receiving my complaint the Tampa Division approved the Group II drug investigation utilizing an enhancement of funds from USOU. I was listed as the undercover agent on this approved undercover operation. I believe the proposal still had references to the terrorism aspect of the investigation and my role portraying a domestic terrorist. The Tampa Division vouched for the credibility of the CW (and I believe the CI as well) in the proposal. A letter from the US Attorney indicating no entrapment issues existed should have been attached to the proposal before it was forwarded to Headquarters. Despite this, the Tampa ASAC sent a contemporaneous e-mail to CTD directly contradicting the proposal by describing both the CW and the CI "unreliable" for the first time.

In the fifth paragraph of this section of the OIG report (page 13) there are quotes from the Tampa Division ASAC's e-mail to CTD indicating Subject 1 is a "common criminal" who had long been known to the Tampa Division. In the e-mail the ASAC ... denied there had ever been any indication that [Subject #1] was a terrorist threat to the United States... It is interesting to me that this e-mail, written before the Tampa Division investigation of my complaint states exactly the conclusions the Tampa Division internal investigation reached months later. This statement is carefully worded to a certain degree because the terrorist group which Subject #1 supports does not target the United States, but reports by the CI documented in Tampa records clearly indicated a year and a half earlier that Subject #1 was indeed aiding terrorists in the United States. CI's reports had never been acted on, except to open an unrelated drug investigation. This is one lead the Inspection Division personnel who interviewed me said needed to be cleared up by Tampa Division. The lead ended up being covered by the same Tampa ASAC who earlier wrote the December 3, 2002 Tampa EC which falsely denied the January 23, 2002 meeting was recorded and the February "clarification" EC that included the falsified FBI documents.

Paragraph eight of this section details statements made by the Orlando SSRA that the Tampa SAC directed him to notify my supervisor that I would not be contacted by Tampa ...to avoid unproductive disputes between German and Tampa Division... and that I was not invited to the post-review briefing ...because of friction between German and the Tampa Division. This is the definition of retaliation. After my letter I had no

contact with Tampa Division managers and only periodic contact with the Orlando drug investigation case agent, which was friendly. The only "unproductive disputes" and "friction" was my letter reporting misconduct by Tampa Division managers and agents. That these statements were made immediately after my letter of complaint was received establishes a prima facie case of retaliation. The Orlando Group II was approved, officially assigning me as the undercover agent in the investigation. No legitimate reason for removing me from the investigation is cited in the OIG report. **The OIG determined that removing me from the investigation was a "personnel action," but somehow concluded this was not retaliation. I request OIG to review this conclusion.**

Paragraph ten of this section (page 14) details statements made in a December 3, 2002 EC from Tampa Division but neglects to point out that this EC, written by a new Tampa ASAC, also included false statements denying the January 23, 2002 meeting was recorded and repeated the concocted version of events from the October FD-302. As stated earlier, this ASAC ignored the conflicting contemporaneous accounts of the meeting in the February 8, 2002 Tampa EC to DTU, the transcript of the meeting, the Group I proposal submitted to DTU, my September 10,2002 letter and other documents in FBI indices, in favor of two conflicting FD-302s created after my September 10, 2002 letter. Other statements quoted in this paragraph are also false, such as the statement that the CW was "driving the relationship," and the statement that "at no time did [the subjects] speak of terrorism, which are both contradicted by the transcript of the January 23, 2002 meeting.

b. IG ANALYSIS

The last sentence of the first paragraph in this section (page 14) states ...in our review of the summary of the key meeting between the informant and the primary subject, we did not find evidence to question the Tampa Division's conclusion that no terrorist threat was missed... I request a clarification of which "summary of the key meeting" was reviewed. Certainly not the contemporaneous summary of the meeting documented in the February 8, 2002 Tampa EC to DTU, or the transcript of the key meeting, or the Group I submitted to DTU in April of 2002, or any other document produced prior to my September 10, 2002 letter, because all of those contradict that OIG conclusion. Only summaries created after my letter indicate no terrorism was discussed in the meeting. **I request OIG review the documents detailing this meeting prior to my letter, especially the incontrovertible evidence in the transcript I provided to OIG in February of 2003 and revise this conclusion.**

2. ALLEGED INADEQUATE RESPONSE BY THE INSPECTION DIVISION
a. THE INSPECTION DIVISION REVIEW

In the fifth paragraph of this section the report quotes the team leader of the Inspection Team as saying the Chief Inspector requested he "take a look at the whole thing." This is how FBI managers conduct a retaliatory investigation without documenting what would be an obvious violation of whistle-blower protection laws. By looking at "the whole thing" the Inspectors also investigated my conduct in the

investigation. The inspectors told me they investigated allegations that my travel to Tampa Division was unauthorized and that I spent $50 in case funds without authorization. Both allegations were proved to be baseless, but that is not the point. They conducted a retaliatory investigation without making a record of it. If they had found something they would have been able to justify their retaliation as an independent rationale for taking a personnel action against me. I asked the Inspectors to document who accused me of these violations, but they refused. Also interesting was the fact they told me they investigated my conduct. I took this as a warning that they would keep investigating me if I didn't stop pressing the matter. I can't say if it was meant to intimidate me, but it did intimidate me.

This is similar to a Tampa Division security inquiry made into the indices searches my Atlanta partner assisted me with. The action wasn't made against me directly, and no wrong doing was found, but I believe the inquiry was meant to intimidate me. I reported this immediately to the OIG but no action was taken.

b. OIG ANALYSIS

The OIG report states the Inspection Division review was thorough, but it ignored the overwhelming number of indices references of Subject #1 in FBI counterterrorism investigations which I documented in my December 2003 EC to CTD.

The Inspection Division review did not uncover the intentional falsification of FBI records detailed in this report, or the retaliation against me, so I don't know how this review could ever be called "thorough."

3. OPR FAILED TO OPEN AN INVESTIGATION INTO MISCONDUCT

a. DECEMBER 2002 OPR INTERVIEW

The second paragraph of this section includes a description of the OPR investigator refusing to incorporate my September 2002 letter into the statement. I don't know why this is even in the OIG report except to make me look argumentative. It is certainly true, but if the OIG is going to tell this story tell the whole story. After refusing to interview me for two months, the OPR supervisor handed me the September 10, 2002 letter, all six pages of it, and made me read it to her verbatim, while she transcribed it in handwritten notes. She then typed up her notes, which was nothing more that a verbatim copy of my letter. The process took almost two hours to end up with a near copy of the letter I typed three months earlier. The OIG investigator took the statement and added material about what I said after reading the letter, and I added information about the retaliation against me, but the procedures used by the OPR investigator seemed unusually wasteful and unnecessary. I request the OIG remove this reference from the report.

b. FEBRUARY 2003 OPR INTERVIEW

In the fifth paragraph there is an allegation I made that ...someone in OPR must have notified Tampa Division management... I actually told OIG who made this call.

On the first day of my interview, after providing OPR with the transcript that proved the December 3, 2002 Tampa Division EC false, OPR Unit Chief John Robert came into the interview room and said he had good news, that Tampa Division located the tape in the Orlando supervisor's desk. The OIG investigator was present in the room when this was said. He should remember it because when Unit Chief Roberts left the room I turned to the OIG investigator and said, "I just got f****d." The OIG investigator dismissed my concerns and took no action to secure the evidence in Tampa or address the breach of confidentiality regarding my statement to OPR.

That Tampa Division issued a "clarification" EC that very day did not surprise me. That the "clarification" EC maintained the veracity of the concocted version of the January 23, 2002 meeting described in the October FD-302 did surprise me, as it was in direct conflict with the conversations documented on the transcript. The FBI maintains that version of events is true and the OIG will not review the transcript I provided them. The Orlando SSRA worked for Roberts in OPR before being assigned to Orlando.

This is material because, due to the awkward methods OPR used to document my statement, it was not completed for my signature for several days and therefore was dated several days after the Tampa "clarification" EC. In my later interview with FBI Inspectors one of the Inspectors stated that since Tampa clarified their error before my OPR statement, according to the dates on the documents, the error was considered inadvertent.

2. TAMPA DIVISION'S EC CONTAINED FALSE STATEMENTS

The third paragraph of this section advises the Tampa ASAC who wrote this report ...relied on documents in the case file to create the EC... As stated earlier, the ASAC had to ignore documents in the case file that were contemporaneous with the meeting, as well as my September 10, 2002 letter, in favor of FD-302's created after my letter. That he later wrote the February Tampa EC that contained falsified documents should weigh in the evaluation of his conduct in this matter as well.

The fourth paragraph indicates the OIG found the documents in the case file "confusing and unclear." They are not confusing and unclear, they contradict each other. Why there are several conflicting accounts of the same meeting documented in FBI files is something the OIG should have investigated. All of the descriptions of the meetings that proceed my September 10, 2002 meeting that are in agreement with the transcript of the meeting. There are two FD-302's summarizing the same meeting written after my letter. The later FD-302s conflict with the earlier accounts and with each other. There is no need to guess which accounts are true because there is a transcript of the recording of this meeting, which I provided to the OIG in February of 2003. The mere existence of this transcript proves the Tampa ASAC's statements in his December 3, 2002 EC are false, as does the substance of the conversation documented in the transcript. The OIG's refusal to challenge the FBI's conclusions about the Orlando terrorism investigation makes a fair determination of the veracity of the statements in this EC impossible.

3. TAMPA FAILED TO ADDRESS VIOLATION OF LAW

The statement in paragraph two of this section ...the violation most likely was missed at the time it occurred because the recording of the meeting was not reviewed by the original case agent until after the Tampa Division had received German's September 2002 letter... is in error. The CW advised the Orlando terrorism investigation case agent that he wanted her to transcribe the tape so he could find out what happened in the part of the meeting he was not present. As stated earlier, that fact that the CW was advised of the rules governing consensual monitoring shortly after this meeting and the fact the tape was transcribed early in the investigation support the CW's account. I received a copy of the transcript well before I wrote the September 2002 letter. I had virtually no contact with Tampa after I wrote the letter and they certainly would not have given me a copy of the transcript at that time because they were denying the meeting was recorded.

The final paragraph of this section stating the OIG conclusion that the Orlando RA took appropriate action by simply giving the tape to the supervisor is contrary to federal law, DOJ and FBI policy. A Title III violation is a serious violation of the law, punishable by criminal penalties. Electronic surveillance is a very intrusive investigative technique and the FBI and DOJ correctly have stringent policies and procedures for how this evidence is handled. If an inadvertent Title III violation is caught right away there is a procedure for immediately segregating the tape with a "Chinese wall," but no one on the investigative team can remain in possession of the tape until the offending portion is removed. The fact that this tape was transcribed and disseminated to agents working the investigation months earlier makes curing this violation nearly impossible, but simply giving it to the Supervisor of the investigation to keep in his desk for several additional months would never be appropriate. Even if the tape did not include a Title III violation this would be a severe violation of FBI rules of evidence and electronic surveillance regulations. That Tampa Division was producing FD-302s and ECs denying this meeting was recorded at the time this critical piece of evidence was being mishandled should inform OIG's analysis of whether Tampa Division's response to this matter was adequate. **I request OIG review the conclusion that the Tampa Division's handling of electronic surveillance evidence collected in violation of Title III was "appropriate."**

4. TAMPA DIVISION LIED TO FBI HEADQUARTERS

I object to the use of the subjective term "lied" in the OIG report. **I believe all of my written allegations use the term "made false statements" and I would like that terminology used when referring to my allegations.**

The OIG analysis of this section is redundant because the OIG blindly accepts the FBI conclusions that there was no link to terrorism as true despite the overwhelming evidence I provided to the OIG, including a transcript of the meeting. If the OIG actually believes these Tampa Division statements are true how could the OIG General Counsel's office reasonably suggest that I refrain from naming the terrorist groups involved in the investigation?

5. ALLEGED ACTS OF REPRISAL FOR THE PROTECTED DISCLOSURE
a. FBI OFFICIAL MADE DISPARAGING REMARKS

Paragraph two of this section documents a statement from the Orlando drug investigation case agent that the Orlando SSRA's instruction to not contact me was appropriate ... in light of the impending Inspection Division investigation... The problem with this account is that the case agent was told not to contact me immediately after my September 10, 2002 letter was received, while the Inspection Division was not even aware of this matter until February of 2003, and did not travel to Tampa Division until March of 2003, when the Orlando Group II UCO I was assigned to was scheduled to expire.

The fifth paragraph details an October 16, 2002 Tampa EC written by the Orlando SSRA, which concludes that ...no link tying [Subject #1] to terrorist activity or to terrorism had been established... This statement in the conclusion of the EC is actually contradicted in the 30-page summary of the undercover recordings that are included in the same EC. When I pointed this out to the Inspector he was shocked and could not understand why this would be done. I explained that the Orlando SSRA probably assumed no one would read the 30-page summary and would instead go straight to his conclusion. Apparently it worked.

The conclusion in October 16, 2002 EC that there was not a link to terrorism is contradicted by all of the documents in the investigative file prior to my September 10, 2002 letter, and in the Group I and Group II UCO proposals the Orlando SSRA was responsible for, so the Orlando SSRA knew better than anyone else the multitude of FBI records linking Subject #1 to terrorism. I believe the October 16, 2002 EC also contained a summary of the October FD-302 of the January 23, 2002 meeting which denied the meeting was recorded. The Orlando SSRA knew this was false because the tape recording of the meeting was in his desk.

The Orlando SSRA's insertion of the phrase "Tampa opines the money laundering angle can still be pursued by... a qualified UCA who can work as part of a team with case agent" was retaliatory because I had already been selected as the undercover agent in the duly approved Group II operation. I was not "tentatively" selected as the OIG report states.

But as to the retaliation, the account by the Orlando SSRA regarding his actions after my letter is tantamount to a confession. The SSRA said ...he was concerned about German's conduct on the undercover matter, even before German sent his September 2002 letter...he was concerned about German's excessive contacts with the informant without the knowledge of the case agent who was primarily responsible for handling the informant...[and] was troubled by German's communications with FBI officials outside of the Tampa Division... None of these complaints was registered prior to my selection as the undercover agent in the Group I proposal submitted through this SSRA in April of 2002, the Group I submitted by this SSRA in June of 2002 or the Group II approved by

Tampa Division management immediately after my September 10, 2002 letter was received by the Tampa Division.

But more to the point, neither my contact with the CW nor my contact with Headquarters supervisors was inappropriate. Both case agents were well aware of these contacts and approved of them. I was assigned to go undercover in a terrorism investigation with this CW by my side, and we were going to pretend to be life long friends. This requires building a relationship of trust and developing a legend that incorporates stories from both people's backgrounds. The Tampa Division even sent the CW up to Atlanta at one point so we could spend time together. Undercover work is extremely dangerous, particularly in terrorism investigations and drug investigations. Not knowing if your partner has a sister can get you killed. FBI undercover training teaches undercover agents never to be their CW's handling agent because this leads to potential conflicts over payments or other administrative matters that can get in the way of the UCA-CW relationship. The CW was instructed that substantive matters regarding the investigation were to be reported to the case agents, not to me. As to my contacts with Headquarters supervisors, these contacts were directly related to the poor management of this investigation that is amply documented in the OIG report, and to retaliate against me for reporting his misconduct is the definition of retaliation.

The Orlando SSRA also states that after he became ASAC in another office he allowed one of the agents to use German in a combined FBI/local police undercover school. In fact, the Orlando SSRA tried to prevent me from providing training at this course, which I had written and implemented years earlier to assist the local police. At the request of the Division and the local police department I returned to assist with the course every year, even after I transferred out of the Division. When the Orlando SSRA became ASAC of this Division he told the agent who put the course on that I could not come to assist the agent, and made inappropriate remarks about me. It took the intervention of an Assistant Director from Headquarters who was the previous ASAC of this office to overrule the Orlando SSRA and allow me to come teach the course.

But more significant is the Orlando SSRA's role in the retaliation by USOU Unit Chief Jorge Martinez. The report later states that Martinez and other Headquarters agents ...were discussing German's letter... when Martinez said I would never come to another undercover school. The OIG found this to be retaliation in violation of whistle-blower protection regulations. But the OIG report omits the fact that USOU only knew about the contents of my letter because the Orlando SSRA sent them a copy via Bureau e-mail. The Orlando SSRA had no legitimate purpose for sending my letter to USOU except to incite them to retaliate against me, which Unit Chief Jorge Martinez did. **I request the OIG reconsider its conclusion regarding the Orlando SSRA's retaliation against me.**

b. OREGON SAC ALLEGEDLY TRIED TO EXCLUDE GERMAN FROM PORTLAND UNDERCOVER CASE

The OIG report's analysis of the conduct of the Portland Division SAC's conduct toward me omits several important details. First, SAC Jordan was the Assistant Director

of OPR when CTD sent OPR the October EC containing my September 10, 2002 letter and accounts of the false statements to CTD by the Tampa Division. AD Jordan made a handwritten notation to the effect, "I see no allegation of misconduct" on the face of the EC and OPR did not open an investigation. When I appeared for my second OPR statement in February of 2003 to report the Tampa Division's false statements denying that the January 23, 2002 meeting occurred, I asked to meet with AD Jordan to discuss the failure of OPR to investigate the matter but he refused to meet with me.

The Portland Division had already selected me to be the undercover agent in a domestic terrorism investigation against a high priority domestic terrorism organization. The Proposal was submitted to USOU and the DTU in January of 2003. By the summer of 2003 USOU and DTU had still not brought the proposal into the Undercover Review Committee that approves Group I UCO proposals. Around that time AD Jordan was demoted as a result of an OIG investigation finding him guilty of retaliating against an FBI whistle-blower. He was assigned as SAC Portland.

SAC Jordan's statements to the supervisor and case agent of the UCO about my status as a whistle-blower being "problematic" immediately after he was demoted for retaliating against whistle-blowers reveals how little FBI managers care about protecting whistle-blowers. SAC Jordan's concern about my speaking to members of Congress is irrelevant. I have a right to speak to my Congressmen without being denied assignments in the FBI. SAC Jordan told the case agent that the consensus at Headquarters was that I was trying to scam the Bureau. SAC Jordan's referral of the supervisor and case agent to the Chief Inspector, who told them my allegations were "unfounded" demonstrates collusion in the retaliation. Sharing information from an internal inquiry of this nature is totally inappropriate, especially since the Inspection Division investigation was not yet complete. Also, the Inspection Division investigation found many of my allegations had merit, but that wasn't reported to the Portland supervisor. The intent of the Inspection Division leak of this matter was a concerted effort to deny me an undercover assignment.

In August of 2003 I attended a meeting at FBI Headquarters with USOU and DTU that was intended to clear up remaining obstacles preventing the operation from moving forward. The proposal was still not submitted for approval.

In November of 2003 SAC Jordan did indeed recuse himself from the decision of whether to use me in the Portland UCO, which had still not been approved, but only after an Executive Assistant Director of the FBI intervened to allow me to remain in the investigation. I met with SAC Jordan, the supervisor and case agent to get this matter on track. I asked SAC Jordan about the statement made to the case agent about me scamming the Bureau. The case agent confirmed the statement in the SAC's presence, but SAC Jordan neither confirmed nor denied it. I asked him to report whoever at Headquarters made this statement to the OIG but SAC Jordan refused. SAC Jordan dismissed my concerns that the Portland UCO was being delayed to retaliate against me and said the proposal would be put forward in the next Undercover Review Committee meeting.

In the following Undercover Review Committee meeting in December of 2003 the Portland proposal was not submitted for approval, but rather for "approval in concept," which I had never heard of during twelve years of undercover work. A DTU supervisor executed an EC recounting the results of the Undercover Review Committee meeting that purported to explain the problems remaining in the Portland proposal. At least one of the items singled out the selection of the undercover agent. The EC made a statement to the effect that the Undercover Review Committee was going to give USOU the power to oversee the selection of the undercover agent for the Portland investigation. An FBI supervisor in attendance at the Undercover Review Committee meeting who was later provided with a copy of the DTU EC told me the selection of the undercover agent was never discussed in the meeting. The DTU supervisor who wrote this EC had formerly been assigned to the Tampa Division.

FBI officials have repeatedly stated in public testimony that penetration of terrorist cells is the key to preventing terrorism, but over a year had passed while the FBI sat on a proposal to infiltrate a high priority domestic terrorist group.

I request the OIG reconsider its conclusion regarding SAC Robert Jordan's role in retaliating against me for making a protected disclosure.

c. ALLEGATION THAT GERMAN WAS EXCLUDED FROM FUTURE UNDERCOVER CASES AND UNDERCOVER SCHOOLS

The assertion by Unit Chief Martinez in paragraph eight (page 37) that the Unit Chief of USOU ...did not have the authority...to influence the selection of an undercover agent in a field operation... is absurd. USOU is responsible for coordinating the presentation of operational proposals to the Undercover Review Committee for approval. By not moving the proposal forward, the USOU can prevent an operation from receiving approval, as it did in the Portland case. Many times case agents are allowed to present their UCO proposals to the Undercover Review Committee, particularly if the operation is unusually complex. In the Portland case the case agent requested to make the presentation but was refused. By delaying the presentation to the Undercover Review Committee for almost a year, and then only presenting the "concept" of the proposal when the Undercover Review Committee finally met to discuss the Portland case, USOU and DTU effectively prevented my participation in the investigation. DTU also created a fraudulent December 2003 EC that purported to give USOU authority over the selection of the UCA for the Portland investigation, effectively usurping this power for USOU surreptitiously. Nobody ever investigated this false statement.

Unit Chief Martinez said he was going to prevent me from working undercover and he played a role in preventing me from working undercover on the Portland investigation. USOU and DTU used obstructionist bureaucratic tactics to unreasonably delay an operation involving a high-priority domestic terrorist group for an entire year.

I request OIG reconsider its conclusion regarding UC Martinez's role in obstructing my participation in the Portland undercover operation.

d. FBI'S RESPONSE TO BOOK IDENTIFYING GERMAN AS UNDERCOVER AGENT

The personal information released in the book and the nature of threats against me previously documented in FBI files were submitted to USOU and the Undercover Safeguard Unit, both of which are responsible for assuring the safety of FBI undercover agents, yet no action was taken to perform a threat assessment. I did not suggest that my Atlanta supervisor was involved in the retaliation against me, only that the FBI's response to the situation was inadequate.

REQUEST FOR REVISIONS TO THE OIG REPORT

I respectfully request that the OIG re-evaluate its decision not to independently examine the validity of the FBI Tampa Division and Inspection Division conclusions that the subjects of the Orlando investigation have no links to terrorism or terrorist funding, and that the Orlando investigation revealed no link between domestic and international terrorist groups. The interests of justice require such an investigation, particularly in light of the OIG's findings that FBI records material to this OIG investigation were altered and falsified by FBI employees in a clear attempt to obstruct the internal investigations.

A simple computer check of FBI indices will reveal a multitude of references from independent sources linking the subjects of the Orlando investigation to terrorist organizations and activities. A review of the transcript of the January 23, 2002 meeting, which I provided to the OIG in February of 2003, will establish the link between domestic and international terrorist groups. An OIG investigation of this matter will not depend on the credibility of any witness, but rather a simple comparison of what existed in FBI files before my September 10, 2002 letter against what was placed in FBI files after my letter. The OIG findings regarding the Tampa Division false statements and the handling of the tape recording containing the Title III violation cannot stand without verification of the truthfulness of the underlying FBI conclusions. The failure of the FBI to adequately investigate other aspects of my allegations suggests the need for an independent investigation.

If the OIG refuses to undertake such an investigation I request this OIG report be amended to clearly state what steps the OIG did or did not take to evaluate the conclusions of the FBI internal investigations regarding the links to terrorism. As it stands the comments in the report regarding the OIG evaluation of the FBI conclusions are confusing, and even misleading if the oral representations made to me regarding the scope of the OIG investigation are true.

I also respectfully request the OIG re-evaluate its conclusion regarding the retaliatory nature of the personnel action taken against me by SAC Tampa and the Orlando SSRA, and re-evaluate the roles the Portland SAC and the USOU Unit Chief played in obstructing my participation in the Portland undercover operation.

Mr. SHAYS. Thank you, Mr. German.

Mr. German, I could have closed my eyes, when you talked about falsification and so on, when we had our hearing about Mr. Salvati, who was in prison on death row for 30 years because two FBI agents falsely accused him, knew that he was innocent of the crime because they knew who committed the crime, but because they were trying to cover up one of their sources, they let him languish in prison for 30 years, and his wife visited him every week for 30 years. He is out now. But wouldn't it have been incredible if someone from the FBI had been a whistleblower then? Thank you for your testimony.

Mr. Tice.

STATEMENT OF RUSSELL D. TICE

Mr. TICE. Mr. Chairman, distinguished members of the subcommittee, I thank you for having me on the subcommittee as a speaker. I realize this is Valentine's Day. I hate to have to give you another horror story like it would be Halloween, but, unfortunately, that is what I am about to do.

My career started in 1985 by joining the Air Force right after getting out of college. I worked in the SIGIN field in the Air Force. From there I became a contractor working SIGIN issues for the National Security Agency as well as a few other intelligence agencies. From there I became a Government employee intelligence analyst for the Department of the Navy. From there I moved to the Defense Intelligence Agency as an intelligence officer, and from there I moved back home—at least I considered it a homecoming—to the National Security Agency.

In the spring of 2001, I noticed that a coworker—and this was when I was at DIA—exhibited the classic signs of being involved in espionage. I liked this coworker. Everyone liked this coworker. But, nonetheless, the signs were frequent travel to a communist country, a political philosophy that lent itself that the United States should not come to the support of a democratic nation against the communist country, late hours on a classified computer, living beyond her means, buying a home that she should not have been able to afford at her GS level. I came to the conclusion that I would have to report this because ultimately it was my responsibility. The young lady was popular so I kept it very quiet in doing so. I told none of my coworkers, nor my supervisor that I had done so.

Well, a few things happened after that. I was contacted by the DIA counterintelligence officer involved in the case, and he said he was going to look into it. Shortly after that encounter with the DIA counterintelligence officer, the mother of the individual who was, I thought at that time, very high up in DIA, came to our office even though she was recently retired. I thought this was highly unusual, and I told the counterintelligence officer that. He ultimately told me that there was nothing to it. It was a coincidence.

Ultimately, I found out that this woman, the mother, was a lot higher up than I thought. She was actually a Deputy in the Department of Defense at the Pentagon for Command, Control, Communications and Intelligence. She was also a Principal Deputy Director at the Defense Security Service, and she was high up before

that in DISA, the Defense Information Systems Agency. But, nonetheless, I believe to this day that the mother was there possibly to warn the daughter that something was coming up because it made no sense that she had showed up. Maybe 2 weeks after that encounter, the DIA counterintelligence officer told me that there was nothing to my suspicion.

After I returned to the National Security Agency in November 2002, I was involved in the operational intelligence work for the Iraq war, and we were quite busy, so I really did not have a whole lot of time to think about what happened before. When things started winding down at the initial stage of the Iraq situation with our military forces going in, I had a little bit of time to start reading through some things. One of the things I read through was two FBI agents in California that had been involved apparently or supposedly swapping counterintelligence secrets for sex with a suspected Chinese double agent. At that time, remembering that ultimately I got blown off pretty quick on my suspicions, I sent an e-mail on a classified system to the individual at DIA—no one else, just to that individual. Up until that time, no one else knew. At that point I basically said that the FBI was incompetent in dealing with counterintelligence measures.

Well, I found out very quickly after that counterintelligence agent contacted security at NSA, and 2 or 3 days after that, I was contacted and told that I had to submit to an emergency psychological evaluation. I had just been to my routine psychological evaluation at NSA in preparation for my swap over from DIA back to NSA and passed with flying colors. So 9 months later, the very same office is now calling me for my emergency psychological evaluation.

At that time, I was told I was wrong about my suspicions. I also believe that my phone may have been tapped and that ultimately later I was being followed by the FBI. I know that to be true because I turned the tables on one of the FBI agents that was following me. I walked up behind him, and he was wearing his service pistol and his FBI badge on his hip, so there wasn't a whole lot of question there.

Nonetheless, I was called for a psychological evaluation, and I was very quickly determined to be mentally ill, suffering from paranoia. At that point, I went up the chain of command. I even went to the Deputy Director of NSA, who I just happened to know personally, to no avail. I waited a few months—in the motor pool, by the way, of NSA was where I was sent. I finally went to Senator Mikulski and asked her as my congressional representative to help out. I was told at that point that I was off the reservation or informed that I was off the reservation and I would pay dearly for doing so.

Mr. SHAYS. Who said that?

Mr. TICE. I was told that by the person that was dealing with the liaison office, that by doing so I was likely to pay dearly, and that I was putting my head "above the radar screen."

Mr. SHAYS. OK. Please finish up your statement.

Mr. TICE. Sure. To make things quick, I went to the Merit Systems Protection Board and basically was told the Merit Systems Protection Board cannot look at the merits of my case as ultimately

having my security clearance suspended. I went to the DOD IG. The DOD IG went to NSA's IG and allowed NSA to investigate themselves. Ultimately that report came out against me.

It all turns basically that I was not left with many options. I have some details. Ultimately it is 17 pages that I would like to have you read and have submitted to the record. But, nonetheless, you know, on my way in here, walking by the Supreme Court temple, I notice inscribed in the entrance that it says, "Equal Justice Under the Law." In the intelligence community, as an intelligence employee, there is no equal justice under the law. Whistleblower protection acts do not apply to us.

Thank you very much.

[The prepared statement of Mr. Tice follows:]

Testimony of Russell D. Tice
Former Intelligence Officer, National Security Agency
Member, National Security Whistleblower Coalition

Before the
House Subcommittee on National Security, Emerging Threats and International Relations

National Security Whistleblowers
February 14, 2006

Chairman Shays and the distinguished members of the Subcommittee, I am honored to be here today to inform you of my firsthand knowledge of abuses that have taken place within the National Security Agency and the Defense Intelligence Agency as they relate to retaliation against national security whistleblowing.

My career started in the intelligence community in 1985 with the United States Air Force and their Electronic Security Command in the field of signals intelligence. In 1990, I transitioned to intelligence work as a contractor working with the National Security Agency and other government intelligence agencies. In 1995, I accepted a government intelligence analyst position with the Department of the Navy. From the Navy, in 1999, I took a promotion with the Defense Intelligence Agency and, subsequently, returned back to my roots at the National Security Agency in 2002. Throughout my time as an intelligence officer I have gained a broad perspective of all aspects of the intelligence community.

In the spring of 2001, I suspected that a fellow coworker at the Defense Intelligence Agency might have been involved in espionage. This person exhibited many of the classic signs, to include: living beyond her means; excessive amounts of time on classified computer networks; frequent unofficial travel to a communist country; a political philosophy that supported a communist country in a potential conflict that could involve the United States; and many connections with foreign nationals from a communist country. I knew that it was my responsibility as an intelligence officer to report this and I did so quietly, not involving any of my coworkers, or even my supervisor.

Interestingly, soon after I made this report to the DIA CIO, the mother of this person in question visited the highly classified facility where her daughter and I both worked. The mother was recently retired, after being employed in high-level positions within the Department of Defense (DoD) to include: the Defense Information Systems Agency; the DoD Directorate for Command, Control, Communications, and Intelligence; and the Defense Security Service, which controls security clearances of DoD personnel. These positions would have required the mother to retain high security clearances.

Amazingly, the mother was also a former foreign national of a communist country who came to the United States in 1960 as a young woman.

Soon after the unusual, unscheduled visit from the mother, the counterintelligence officer investigating the case informed me that my suspicions concerning the daughter were unfounded. However, I continued to see behavior from the daughter that led me to believe there was a problem. This led me to the conclusion that something may have been premature about the hasty determination of the counterintelligence office.

While working at the National Security Agency I sent a secure e-mail on a classified network to the counterintelligence officer at the DIA who had so quickly dismissed my suspicions. This e-mail was the result of two FBI agents in California who were supposedly availing counterintelligence secrets to a suspected Chinese double agent for sexual favors. I suggested that the FBI was incompetent in dealing with counterintelligence matters, inferring that the DIA CIO do a thorough investigation regarding my concerns, to avert a similar situation from occurring at DIA. This event has characterized me as a whistleblower, and was the catalyst for retaliation against me by the National Security Agency.

The counterintelligence officer at the Defense Intelligence Agency then contacted the security office at the National Security Agency, which resulted in my being ordered to submit to an emergency psychological evaluation. I had just been to my routine psychological evaluation, conducted by the same office, only nine months prior and passed with no signs of mental illness. For this second evaluation, even though all the testing once again showed I was normal, I was assessed as suffering from paranoia. This was the justification used to suspend my access to classified information.

My Kofkesk journey, from that time on, involved: surveillance by the FBI; denials from NSA that monitoring was being conducted; being placed in purgatory at the agency motor pool, where I was told little about my status; denying access to my own personnel and security files; evidence of FBI and NSA security documentation being hidden from the Office of Personnel Management; official complaints about psychological abuse being disavowed and their records vanishing; an agency security officer sent to my home to threaten me in person with dire consequences if I talked to the press; being banished from all agency facilities even the non-secured spaces; being denied Freedom of Information Act requests for my own unclassified files for reasons of criminality and privacy rights; having my good name slandered and mistruths invented about me as a means to justify revoking my security clearance; the agency blatantly violating their own regulations and directives in order to ensure an adequate defense could not be mounted; being sent to a remote agency warehouse where I was forced to perform backbreaking labor in a last ditched attempt to force me to resign; and finally, I was subjected to a classic kangaroo court clearance revocation hearing where the same individuals maligning me were members of the panel and their names withheld, concealing their identities.

In the first amendment to the United States Constitution, citizens are given the right to petition Congress as to grievances. In the intelligence community, employees are told that they must contact a congressional relations office or some other form of intermediary that will quickly deter such an encounter. When I first contacted my senatorial congressional representative, the agency was furious that I had "gone off the reservation" and I heard that I would "pay dearly". Soon after that, I learned that the security office at NSA had quashed an award for my outstanding intelligence support involving the military action in Iraq. When I wrote one hundred and thirty two letters to congressional members involved in oversight about the abuses of the NSA's security office, six days later a memorandum was written by security to have my security clearance revoked. After I spoke on Capital Hill to congressional staffers from both the House and Senate about the abuses of the National Security Agency, four days later I was told that I was to be removed from federal employment. This is the contempt by the NSA that was shown for congressional oversight of intelligence.

I was not given substantive options for reporting the injustices that were inflicted upon me as a whistleblower. I did not approach my agency's inspector general's office because I knew they were co-opted by the security office. I attempted to work within the agency's chain of command, including personally talking to the deputy director, to no avail. I spent a considerable investment of my time and optimism on filing a complaint with the Department of Defense Inspector General's newly established office of Civilian Reprisal Investigations. These hopes were dashed when the National Security Agency's inspector general was tasked to conduct the investigation regarding the revocation of my clearance. The results were a predictable whitewash that was to be expected from a subordinate element entrusted to investigate it's own taskmasters.

I was fortunate that I was allowed to take my case to the Merit System Protection Board because of my military service, yet the judge did not allow me to argue the merits of the security clearance even as they pertained to due process. The judge also denied most of my discovery requests to include my own personnel files from all the agencies involved. The NSA's lawyers asserted early on that the intelligence agencies were exempt from the provisions of the Whistleblower Protection Act; and even if it were established that I made a protected disclosure under the Intelligence Community Whistleblower Protection Act; the act had no provisions to punish an agency for retaliating against the disclosure.

I have contemplated taking my case to federal court. However, after investigation, I have found that most of the whistleblower cases that have gone to the circuit court in Washington, D.C., result with court decisions showing an obvious bias and hostility against whistleblowers. I also know that the whistleblower laws on the books do not protect federal intelligence employees from retaliation. I realized that all the cards have been stacked against me, and all those retaliated against for reporting waste, fraud, abuse, and malfeasance.

Abusive psychological evaluations designed to revoke security credentials are not uncommon. In my particular case the retaliatory weapon of choice was to revoke my

security clearance through a deliberately false psychological evaluation. A person required to have an agency psychological evaluation is allowed to have his or her own psychological professional conduct an independent evaluation, and have it submitted before the agency evaluation is conducted. I was not informed of this until more than a week after I had taken the agency emergency exam. I know of another agency employee that tried to invoke this right but was told that she would not be allotted the time to set up the private appointment, and have the results submitted. She was told that she would have her security clearance suspended on the spot if she attempted to delay the mandatory evaluation.

I was informed that psychological evaluations are not investigated or checked for credibility at the National Security Agency. Two and a half years ago, I made a complaint about the psychologist that was used as a tool of retaliation against me, and I have never heard from the agency about the status of my complaint. Secondly, the psychological tests administered by the agency psychologists, showing that I am normal were not addressed. In fact, the psychologist that labeled me as paranoid admitted that I did not exhibit any of normal significant signs of mental illness.

The agency's and intelligence community's directives that control the revocation process were purposely kept from me, while I was going through the revocation process. I requested these documents many times. Additionally, NSA does not inform new employees of the law regarding the Intelligence Community Whistleblower Protection Act. In fact, I have not known of any intelligence agency that informed their employees of any type of whistleblower regulations, albeit at the agency level, community level, or the federal level as a whole. Employees within the intelligence community are generally ignorant of any whistleblower provisions, citing the fact that only two or three cases have been brought up by defense intelligence personnel, in regard to the current whistleblower law in the Intelligence Community Whistleblower Protection Act.

The ultimate reason that abuses are taking place is due to the lack of accountability, within the Intelligence agencies. Whistleblowers are kept in the dark on purpose with few legitimate avenues open for them to counter full-court press efforts by their own agency to retaliate against them for whistle blowing, even while these same agencies have lip-service policies that require reporting waste, fraud, abuse, and illegalities. As it now stands, national security agencies are left to police themselves and there is no incentive to do so. Whistleblowers inherently are pointing out wrongdoing that likely will embarrass their agency. This and the fact that the Whistleblower Protection Act does not apply to the intelligence community and the Intelligence Community Whistleblower Protection Act apparently has no enforcement provisions, is allowing wrongdoers the freedom to retaliate with impunity. Evidence would appear to suggest that these wrongdoers are rewarded for their retaliations.

Those that retaliate need to know they will be held accountable to substantiate change within the intelligence community. The Whistleblower laws on the books need to be amended to include stiff enforcement, and the removal of exemption provisions.

These laws also need to let the federal courts know that congress intends to allow the reasoning behind security clearance revocations to be reviewed in whistleblower cases.

The investigation of retaliation for whistleblowing must be removed from the intelligence agencies. It is not credible to have the responsible organization investigate itself, when the reviewing body currently conducting the investigations has their security clearances controlled by the very people that they are investigating. This is true to the general council's office and the inspector general as well. A detachment is required removing the investigators from the possible threats of blackmail by the prospective security office via attacking their security clearances or management influencing their proficiency ratings. These investigators also need to maintain the baseline security clearance for the particular agency they will be investigating for retaliation.

The current system of whistleblower protections in the national security agencies is worse than nonexistent because it gives those that would report wrongdoing a false sense of security, believing the laws that exist will protect them. The truth is that they will not. When all avenues for protected reporting of waste, fraud, and abuse are closed, or will ensure retaliation, people are either forced to remain quiet or resort to drastic measures such as going directly to the press.

Mr. SHAYS. Thank you, Mr. Tice.
Mr. Levernier.

STATEMENT OF RICHARD LEVERNIER

Mr. LEVERNIER. Thank you for holding this hearing. My name is Richard Levernier. I worked for the U.S. Department of Energy. I retired effective January 3, 2006, after being exiled from the DOE nuclear security community for more than 5 years. I accepted an early retirement and buyout from the Department of Energy rather than being paid not to contribute to the national security.

Until August 2000, I was the DOE Quality Assurance [QA] Program Manager for Nuclear Security. My job was to manage a team of experts that reviewed the security plans for DOE nuclear weapons sites and to identify vulnerabilities before they became national security threats. Our QA team oversaw the security effectiveness for the entire nuclear weapons complex. I utilized a team of world-class experts ranging in spectrum from nuclear engineers to U.S. Army Special Forces.

My primary duty was to devise "adversary" scenarios and manage force-on-force tests that pitted mock terrorists against the nuclear weapons protective forces. During these tests, there were numerous artificial limits placed on us in terms of conducting the tests. We were not allowed to surprise the defenders. We had to schedule the tests in advance. We had to follow speed limits. We had to follow the OSHA regulations. At many facilities, we were not even allowed to climb the fences. We had to administratively progress through the fences.

Despite all of this, the mock terrorists would win more than 50 percent of the performance tests that we conducted. Even the so-called wins were suspect. In the tests where the protective forces prevailed, many of the tests resulted in 50 percent of greater casualties for the defending forces. Additionally, in many instances the defending forces, in order to achieve victory, would slaughter hundreds of evacuating employees from the DOE facilities in an attempt to be sure and eliminate the terrorists.

The reason for this abysmal record was ingrained bureaucratic negligence to a terrifying degree. Four years after September 11th, plans to fight terrorists attacking nuclear facilities are still largely predicated on catching the terrorists as they escape. Very little attention has been paid to dealing with terrorists that are suicidal and plan to make entry into the facility, stay in the facility, create a nuclear detonation, and are not interested in escaping.

Some of the facilities refused to change their security plans that post guards so far away from the danger zones that terrorists would have time to enter and leave before even the fastest responders would arrive. This has been demonstrated in performance tests over and over again. This is inexcusable. On September 11th, the United States lost thousands of lives. In a successful terrorist attack on a nuclear weapons facility, there would likely be a loss of lives in terms of hundreds of thousands of people, much greater in terms of the consequences.

My testimony is perhaps more relevant today because I illustrate a long-term pattern of the DOE culture. First, deny there is a problem. Second, refuse to fix the problem. And, third, if the first or the

second option does not work, get rid of the messenger, get rid of the employee, get rid of the manager that is identifying the issues. DOE has done this. It has been documented in report after report after report.

Five years ago, DOE management effectively ended my career as a nuclear security professional by removing my security clearance and transferred me to unclassified duties. In retaliation for sending an unclassified IG report to the media, DOE stripped me of my security clearance. It just so happened that the unclassified IG report validated allegations that DOE managers were forcing people responsible for conducting routine annual security inspections to improve the ratings from less than satisfactory to satisfactory in an attempt to make sure that the system looked better than it actually was.

The agency's primary rationale for taking my clearance was the fact that I had made an unauthorized disclosure. The U.S. Office of Special Counsel determined that all of the retaliatory actions taken by DOE against me were illegal under the Whistleblower Protection Act [WPA]. As a result of that, the Office of Special Counsel ordered the Secretary of Energy to conduct an investigation of all the allegations that I had put forward concerning the problems. However, the Office of Special Counsel and the Whistleblower Protection Act protections for me only went so far as to restore a 2-week employment suspension that I had sustained. It did not have the ability or the jurisdiction to deal with the loss of my security clearance.

The impotence of the Office of Special Counsel was further demonstrated just 2 weeks ago when OSC tacitly accepted DOE's investigative report, which officially insisted that all of the problems that I identified had been fixed, despite the fact that there were at least a dozen reports—some by the DOE IG, some by the Government Accountability Office, and some by internal special blue-ribbon panels that had been commissioned by the Department of Energy—that said exactly the opposite.

The chilling effect of DOE's unlawful retaliatory actions taken against me has been highly effective. No one at this point in the Department of Energy, after seeing what had happened to me, would be willing to come forward under similar circumstances. I am hopeful that sharing my experiences with Congress will help to move this body to strengthen the protection for individuals who blow the whistle on sensitive security issues and in turn create an environment in which vulnerabilities are addressed rapidly and appropriately.

Thank you very much.

[The prepared statement of Mr. Levernier follows:]

Testimony of Richard Levernier
House Government Reform Subcommittee
National Security, Emerging Threats, and International Relations
February 14, 2006

Mr. Chairman:

Thank you for holding this hearing to consider whether current whistleblower legal rights sufficiently protect national security employees against retaliation. My name is Richard Levernier. I have dedicated my entire career to public service: in the United States military, as a metropolitan and federal law enforcement officer, and for more than twenty-three years as a nuclear security specialist for the U.S. Department of Energy (DOE). I retired effective January 3, 2006.

Until August 2000, I was the DOE Quality Assurance (QA) Program Manager for Nuclear Security. My job was to manage a team of experts that reviewed the security plans for DOE nuclear weapons' sites, and to conduct performance tests to confirm risk determinations and identify vulnerabilities before they became major national security threats. Our QA team oversaw security effectiveness for the entire nuclear weapon's complex, from research and development at the national laboratories to bomb manufacturing to the storage of Special Nuclear Material to the transportation of nuclear weapons. I utilized a team of world class experts to evaluate each security plan. Our expertise included systems engineering, vulnerability assessments, computer modeling, physical security systems, nuclear material safeguards, protective forces, performance testing, special weapons and tactics, and military special operations, including active duty U.S. Army Special Forces.

Among my responsibilities was to devise "adversary" tactics and perform command and control operations during force-on-force tests at nuclear weapons facilities. These tests pit an outside expert adversary force, "mock terrorists," against the site protective force using specially modified laser-equipped weapons to enact an actual armed engagement. Despite artificial limits placed on our ability to surprise defenders and obligations, such as obeying government-posted speed limits, stop signs and OSHA regulations, the "terrorists" I commanded would win force-on-force tests more than 50

percent of the time, year after year. These results were extremely troubling, considering that actual terrorists – who would *not* be obligated to coordinate their attack schedule with the security forces or to observe speed limits and avoid building ladders and climbing on roofs – would likely overwhelm site protective forces. Moreover, even the so-called "wins" were suspect. In tests in which the protective forces "prevailed," security forces were often suffering 50 percent or greater casualties or indiscriminately "slaughtering" crowds of evacuating employees. Yet, all that was recorded after these tests was a "win" for the contractor protective force.

This subcommittee has heard detailed testimony in the past on the specific shortcomings of force-on-force testing, as well as systematic security deficiencies throughout DOE. My testimony is relevant today, because I am a direct casualty of the DOE culture that refuses to take the corrective actions necessary to responsibly address these problems that continue to endanger U.S. national and homeland security.

Five years ago, DOE management effectively ended my career as a nuclear security professional by removing my security clearance and transferring me to unclassified duties. In retaliation for sending an unclassified Inspector General report to the media, DOE made an example out of me to all other would-be whistleblowers; I was stripped of my QA security responsibilities and transferred to a windowless basement storage room in the DOE Germantown building, where my primary job responsibility for three years was to manage DOE's official foreign travel program, an administrative function completely unrelated to national security.

The agency's primary stated rationale for taking these actions was that I had made an "unauthorized dissemination of sensitive government information." The U.S. Office of Special Counsel determined that the retaliatory actions taken by DOE were illegal under the Whistleblower Protection Act (WPA) and the anti-gag statute. However, the WPA could only lead to token help – rescinding a two-week suspension. My career as a nuclear security professional could not be restored because I had no way to challenge the suspension of my security clearance, which was unlawfully taken in retaliation for the exact same protected disclosure.

I am testifying today for the same reason that I first disclosed evidence of nuclear security breakdowns at DOE: based on my extensive experience protecting U.S. nuclear

facilities, material, and weapons, I believe that critical deficiencies at the heart of the Department of Energy's safeguards and security program place the health and safety of the American public in grave jeopardy. Unfortunately, my concern for the national security of this country and my impatience with the reluctance of the Department to make vital security reforms placed me on a collision course with senior management at DOE. DOE is fully aware that many of the security problems I identified as a whistleblower four years ago persist and has not taken actions to correct them. Given the significant increases in the terrorist threat which has been universally acknowledged since 9/11, the degradation of national security that results from these deficiencies is now greater than ever. Moreover, the chilling effect of DOE's unlawful retaliatory actions taken against me has been an effective deterrent to others who consider blowing the whistle. I am hopeful that sharing my experiences with Congress will help move this body to strengthen the protections for individuals blowing the whistle on sensitive security issues and, in turn, help to create an environment in which vulnerabilities are addressed in a timely manner, consistent with our nation's security.

I. DOE Service

I had a flawless, exemplary record at DOE until I began internally blowing the whistle on safeguards and security breakdowns in 1997. My DOE service began in the Chicago Operations Office in 1979, where I served as a personnel and physical security specialist. After several promotions and subsequent assignments at the Savannah River Operations Office and at DOE HQ, from 1990 to 1995, I served as the Director of Safeguards and Security at the DOE Rocky Flats Office in Golden, CO. I managed a staff of 50 federal and support contractor security professionals at a facility with an annual safeguards and security budget of more than $50 million. While at Rocky Flats, I was responsible for management and oversight of a contractor protective force with more than 500 armed personnel at a nuclear weapons production facility with 9,000 employees. Rocky Flats maintained an inventory of more than 13 metric tons of Special Nuclear Material (SNM), enough material to fabricate hundreds of nuclear weapons.

In March 1995, I returned to DOE HQ, Germantown, MD, and shortly thereafter started my work as the QA Program Manager for nuclear security. Over the years I was

responsible for the identification and reporting of dozens of serious national security vulnerabilities at DOE facilities. These vulnerabilities and the associated documentation were usually classified due to their national security significance.

I was fully dedicated to ensuring our country's national security for the public health and safety of our citizens. However, due to a multitude of factors, DOE management became increasingly resistant to addressing confirmed security concerns. In turn, I became increasingly frustrated with my inability to effectively communicate serious security vulnerabilities to my management and facilitate the corrective actions necessary to address the problems. These serious vulnerabilities were not my personal opinions. Rather, they represented the consensus conclusions of the DOE security plan QA team. They were corroborated by a litany of internal and independent security reviews, ranging from congressionally chartered commissions to GAO analyses to numerous DOE Inspector General Reports, as well as non-governmental findings and most recently a comprehensive independent DOE/NNSA security review made public in September 2005.

II. Internal Whistleblowing at DOE

1. Resistance to Addressing "High Risk" Quality Assessment Review at Rocky Flats

In March 1997 the QA review team I managed concluded that the Rocky Flats site was at "High Risk," an unacceptable condition in DOE. The geographic location of Rocky Flats, coupled with the types of DOE assets located there and the nature of the security vulnerabilities constituted a serious and substantial threat to the people of Denver, CO and surrounding areas. The High Risk conditions were largely the result of an inadequate protective force capability to respond to a terrorist attack. Because Rocky Flats has been de-inventoried and the issues are no longer exploitable, they're no longer classified. The QA team found that protective force response ability was inadequate for a number of reasons, including (but not limited to) --

- an insufficient numbers of responders;
- responders not properly trained and equipped to address the threat, i.e. a lack of long range weapons. If an attack came from the surrounding mountains, terrorists

would have the ability to shoot down at defenders, but defenders would be helpless and could not fire back at such a long-range.
- similar to what we are currently seeing in Iraq, a lack of hardened response vehicles, such as armored humvees, created an exploitable vulnerability.
- radio communications susceptible to simple jamming.
- alarms that failed to distinguish between tamper, intrusion, and line supervision;
- unacceptably high false alarm rates, causing hundreds of unnecessary protective force responses and complacency by the protective force and plant employees.

I repeatedly documented my team's concerns, through a succession of classified memoranda, to my supervisor. I was repeatedly told that I was creating unnecessary problems, and to "Back off." In an effort to work within the constraints of the system, I began forwarding all my QA reports to my second level supervisor. While my second level supervisor fully supported and was receptive to QA inputs, the program continued to experience bureaucratic resistance from my immediate supervisor. This resistance took the form of QA exclusion from key meetings, arbitrary resource reductions, and decisions to limit the QA scope without appropriate justification. About the end of 1998, my second level supervisor was removed from his position for his outspoken and critical views concerning the status of Safeguards and Security in DOE.

2. Resistance to Implementing Recommendations in President's Foreign Intelligence Advisory Board DOE Security Review

About this same time, numerous high visibility security problems surfaced, including many at Los Alamos National Laboratory (LANL), and external reports critical of DOE's management of Safeguards and Security. Primary among these was a report issued in June 1999 by the President's Foreign Intelligence Advisory Board (PFIAB), "Science at its Best / Security at its Worst, A Report on the Security Problems at the U.S. Department of Energy." (http://www.fas.org/sgp/library/pfiab/) The PFIAB Report contained dozens of significant findings and recommendations which I believe were largely ignored by DOE. The PFIAB report documented these alarming DOE security mismanagement trends:

> **"At the birth of DOE, the brilliant scientific breakthroughs of the nuclear weapons laboratories came with a troubling record of security administration. Twenty years later, virtually every one of its original problems persists...The Department has**

been the subject of a nearly unbroken history of dire warnings and attempted but aborted reforms. A cursory review of the open source literature on the DOE record of management presents an abysmal picture. Second only to its world-class intellectual feats has been its ability to fend off systemic change.

Over the last dozen years, DOE has averaged some kind of major departmental shake-up every two to three years. No President, Energy Secretary, or Congress has been able to stem the recurrence of fundamental problems. All have been thwarted time after time by the intransigence of this institution. The Special Investigative Panel found a large organization saturated with cynicism, an arrogant disregard for authority, and a staggering pattern of denial...Time after time over the past few decades, officials at DOE headquarters and the weapons labs themselves have been presented with overwhelming evidence that their lackadaisical oversight could lead to an increase in the nuclear threat against the United States.

Throughout its history, the Department has been the subject of scores of critical reports from the General Accounting Office, the intelligence community, independent commissions, private management consultants, its Inspector General, and its own security experts. It has repeatedly attempted reforms. Yet the Department's ingrained behavior and values have caused it to continue to falter and fail."

The PFIAB findings and recommendations covered the entire spectrum of safeguards and security activities, including – security and counterintelligence accountability; external relations; personnel security; physical/technical/cyber security; and business issues. DOE's failure to address these significant issues, consistent with established policy, contributed to overall inefficiency of the safeguards and security program and seriously degraded U.S. national security.

Shortly after the report was issued, I initiated actions to ensure that the PFIAB findings and recommendations were implemented into the security plans. When my (new) immediate supervisor became aware of my initiatives, I was directed to stop. When I reminded my supervisor of the pertinent requirement in the report (and in DOE

policy) to *track and address* safeguards and security deficiencies and findings I literally was told to, "Forget about the PFIAB Report."

3. Addressing Vulnerabilities at Rocky Flats and Transportation Security Division through New "Security Czar"

Despite internal DOE reluctance to implement the report's recommendations, findings such as those in the PFIAB Report and the related security scandals convinced DOE Secretary Bill Richardson to create a position of "Security Czar." Retired U.S. Air Force General (four star) Eugene Habiger was selected to fill this new role. Around the time of General Habiger's appointment, the QA program identified unmitigated "High Risk" conditions in the Transportation Safeguards Division (TSD) and Los Alamos National Laboratory's security plan. Additionally, the vulnerabilities identified several years earlier at Rocky Flats remained unresolved.

The lack of an approved security plan at Rocky Flats was becoming a more visible administrative issue and ultimately came to the attention of the new Security Czar. General Habiger selected me to lead a team of my choice to Rocky Flats, to provide all necessary assistance and to resolve outstanding security concerns. Additionally, HQ concurrence authority was delegated to me by General Habiger, specifically for the Rocky Flats security plan. My superiors were very unhappy with General Habiger's direct tasking of this high profile assignment to me.

On October 1, 1999, I briefed my immediate supervisor on the plans for the Rocky Flats security plan assignment. My recommended actions to remedy this situation included:

1. obtaining longer range weapons for selected responders;
2. reassigning numerous vulnerable responders to posts inside protected buildings;
3. consolidating nuclear materials into fewer vaults/targets to increase the numerical superiority of the protective force responders;
4. developing response plans and procedures that were less dependent on effective radio communication that was susceptible to jamming;
5. increasing protective force training while reducing the tactical complexity of the response plans and procedures;
6. improving the reliability and speed of essential electronic alarm systems;
7. improving the testing and maintenance of all critical security systems.

During this briefing session, my supervisor stated that I had circumvented the chain of command, failed to keep him fully informed, and threatened me by stating, "[Your] actions had been duly noted and there would be consequences." In spite of this hostility, due to General Habiger's support I successfully implemented my recommendations at Rocky Flats. In recognition of this accomplishment, I received a $5000.00 performance award.

The vulnerabilities identified by QA review of the Transportation Safeguards Division security plan were extremely serious and posed a significant risk to national security. TSD is responsible for transporting DOE assets, including nuclear weapons, in specially equipped trucks by convoy throughout the United States. The specific exploitable vulnerabilities are classified and cannot be discussed.

In addition to issuing a succession of classified memoranda describing the results of our TSP security review, the QA team briefed my chain of command in detail. Despite my best efforts to convey the seriousness of the TSD vulnerabilities, no action was taken for more than six months! Finally, as a last resort, on November 4, 1999, I prepared a package of the pertinent classified documents highlighting the vulnerabilities at TSD, and transmitted them, by appropriate means, to Mr. David Jones, General Habiger's Executive Officer. General Habiger was immediately made aware and appropriate compensatory and longer term corrective actions were taken. My supervisor later told me he suspected me of, "jumping the chain of command again," and that, "I would pay for it." A month later, in December 1999, I received a lower annual performance appraisal than prior ratings. My supervisor told me the reason for the reduced rating was because I was not considered a team player by management.

4. Participation in DOE OIG Investigation

On January 5, 2000, the president of a security engineering consulting firm for the QA Program I managed wrote a letter to General Habiger that described lying in reports on the security status at nuclear sites and retaliation against individuals trying to correct the security problems. General Habiger forwarded the letter to the DOE Office of the Inspector General (OIG), which resulted in a high profile and lengthy investigation of the allegations.

The OIG Inspection Report, "Summary Report on Allegations Concerning the Department of Energy's Site Safeguards and Security Planning Process (SSSP)," found "[s]ubstantial differences in what was being reported as the actual status of security at Department sites by the SSSP QA function, and what was being reported by the cognizant sites." DOE management was well aware that I was interviewed by OIG representatives on multiple occasions, including one trip to Albuquerque, NM specifically to meet with OIG inspectors. I estimate that I was interviewed by OIG representatives for approximately 25-30 hours over 6-8 weeks. Since the complainant and his principal staff engineer worked directly for me supporting the QA Program, and had done so for many years, we (QA) were viewed by management as "collaborators," and I was held responsible.

On many occasions my superiors told me that my zeal for finding problems was not appreciated and my career would suffer as a result. I was also told on many occasions that I was "responsible" for my support contractors, and that they needed to be "muzzled." Additionally, upon learning of the letter from the contractor to General Habiger, my immediate supervisor told me that the complainant would not work for DOE much longer after making these types of formal accusations against management. Not surprisingly, not long after the OIG report was issued, the contractor was completely eliminated from DOE work.

III. Looking for Relief outside DOE

In 1999, I was assigned to provide technical support to a Special Assistant to the Secretary of Energy, Mr. Peter Stockton, who was evaluating a wide range of security related issues and problems at Los Alamos National Laboratory (LANL) and in the Transportation Security Division (TSD). While evaluating cheating during force-on-force exercises at LANL and TSD, numerous serious irregularities in the DOE Albuquerque[1] security plan program were brought to our attention. While Mr. Stockton was very concerned with the survey program allegations, he referred the complainant to the OIG. The executive summary of the resulting OIG report stated:

[1] Prior to the establishment of the National Nuclear Security Administration (NNSA) in 2000, regional DOE field offices were responsible for security oversight of the national laboratories. The DOE field office in Albuquerque oversaw these responsibilities at Los Alamos National Laboratory and Sandia.

1. Albuquerque management changed [security] ratings for the 1998 and 1999 surveys without providing a documented rationale for the changes.[2]
2. Albuquerque management did not fully address concerns about a compromise of force-on-force exercise during the 1998 Albuquerque Security Survey at LANL.
3. The 1997 and 1998 Albuquerque Security Survey work papers were destroyed contrary to Albuquerque policy on the destruction of records.

The OIG also found:

1. Approximately 30 percent of the LANL Security Operations Division personnel interviewed, who had been involved in the conduct of self-assessments, believed they had been pressured to change or "mitigate" security self-assessments.
2. Some security self-assessments required by LANL were not being conducted.
3. DOE's Los Alamos Area Office security staff was not performing all of the oversight responsibilities associated with the LANL Security Operations Division programs.

When my supervisor gave me a draft copy of the OIG Report in April 2000, I was told it had been officially determined to be unclassified and non-sensitive. The report was reviewed by the DOE Office of Nuclear and National Security Information, Document Declassification Division, which is DOE's ultimate authority on classification matters. Their written determination was issued on March 29, 2000, and stated:

> **"We have determined the documents are unclassified, accordingly, we have no objection to their release to the public.** You are reminded that bibliographical information from all declassified and publicly releasable documents must be made available for inclusion in OpenNet. We are providing the procedures for furnishing OpenNet with the required information."

As an experienced security professional, familiar with the DOE security survey program and the complex long-standing security issues at LANL, I was shocked by the OIG findings. LANL is a major DOE facility, with multiple attractive targets from a threat perspective. The security survey program is DOE's only comprehensive oversight mechanism. The OIG inspection report conclusions were incredible: the survey program was unsound, ratings were being manipulated, documentation was being destroyed in a

[2] DOE Order 470.1 mandates a "Safeguards and Security Program." The purpose of the Order is to ensure appropriate levels of security protection consistent with DOE standards to prevent unacceptable, adverse impact to the national security. The Order establishes that the responsible Operations Office (in this case, Albuquerque) assign ratings of "unsatisfactory," "marginal," or "satisfactory" based on conditions existing at the end of security survey activities; and that survey reports include a justification and rationale for the overall composite facility rating.

cover up, and self-assessment team technical experts were "being pressured" to minimize the reporting of problems to make LANL "look good." My overall assessment of the OIG findings was that security problems at LANL were being intentionally disregarded, inaccurately reported and inappropriately factored into ratings that ultimately are reported to the President.

Given the devastating consequences of the loss of control of DOE assets, including the possibility of an unauthorized detonation of a nuclear weapon on U.S. soil, I was gravely concerned about the implications of the OIG report and the overall degradation of security conditions at Los Alamos – and throughout DOE. Based on my previous experiences, I was also concerned that the OIG report would simply gather dust within the growing collection of reports critical of DOE security and be overlooked by management without taking the necessary actions to address the problems. Given these factors, I believed that it was my duty to provide the UNCLASSIFIED and non-sensitive report to the public, and the only way I knew how to do this was through the media. I believed that providing this public information to the press would serve as a catalyst for improvement in one of DOE's core Security Program elements and thereby enhance our National Security.

On June 26, 2000, I sent to the media a copy of the unclassified draft OIG report that had been provided to me by my supervisor with the previously-noted markings, i.e. "we have no objection to...release to the public." The final version with essentially the same information that *already* had been published on the DOE OIG web site in May 2000, prior to my forwarding it to the media. Because I was afraid of retaliation from DOE for getting the media to focus on these critical and potentially embarrassing issues, I used another DOE employee's name on the facsimile cover sheet when I transmitted the information to two newspapers. Only one of my attempted transmissions was successful; the second failed due to technical reasons and ultimately led to a DOE investigation of the release.

IV. Fallout

The content of the draft IG Report I disclosed to the media was very embarrassing to DOE and numerous senior officials in my chain of command, so DOE opened a

criminal investigation to find out who did it. DOE issued a Letter of Authority to conduct an investigation on July 18, 2000, which stated, "This letter authorizes and informs all concerned parties that the Office of Security Affairs has initiated a formal Preliminary Investigation into potential criminal violations of Title 18 and 42, United States Code, concerning a potential unauthorized disclosure of sensitive and/or classified national security information transmitted via unclassified facsimile to a Washington DC newspaper editor."

During the investigation, which was conducted in early August 2000, I readily admitted that I sent the report to the media. In an effort to address what I thought was the relevant and central issue, **I told investigators that no sensitive or classified information was involved** and volunteered to take a polygraph test to confirm the accuracy of my statements. I understood and acknowledged that using a different name on the facsimile cover sheet was very poor judgment on my part and wanted to set the record straight and ensure that there were no consequences for the other person. I also told investigators that my motivation was to have media coverage serve as a catalyst for improvement of the DOE security program.

On August 17, 2000, I received a letter from the Acting Director of the DOE Office of Safeguards and Security informing me that my security clearance had been suspended effective immediately. The letter stated, **"This action is based on your unauthorized dissemination of sensitive government information to The Washington Post and USA Today**..."

On October 26, 2000, I received an official "Notification Letter" from the new Director of the DOE Office of Safeguards and Security along with a "Summary of Information Creating a Substantial Doubt Regarding Continued Eligibility for Access Authorization." The summary cited two additional documents which were used to support DOE's decision to suspend my security clearance: 1) a March 18, 1999, memorandum from the Director, Office of Security Affairs, to all Federal and contractor employees in the Office of Security Affairs and Office of Safeguards and Security, restricting the release of classified and sensitive information, and 2) a "Security

Responsibility Statement" that was attached to the memorandum, which I signed on March 29, 1999.[3]

The author of the March 18, 1999 memorandum directly and indirectly led the security clearance actions taken against me. This person, as the Director of the Office of Security Affairs was the security official most responsible for the misconduct covered by the OIG report. He had every motive to feel highly threatened by my disclosures, since they raised issues for which realistically the buck could stop with him.

The October 26 "Notification Letter" also informed me of my options in challenging the security clearance action taken against me. Had I chosen to appeal my security clearance suspension within DOE, this same Office of Security Director (despite his conflict of interest and lack of impartiality as the individual that directed the suspension) would have served as the ultimate appeal authority and "Deciding Official" on the suspension. Stated simply, **DOE "due process" on security clearance actions afforded me the opportunity to ask the individual threatened by my whistleblowing and responsible for initiating the retaliation to change his mind.** I was told that I could attempt to keep my security position by appealing the clearance suspension, but if I exercised this so-called "appeal" and lost, I would be fired. I elected not to appeal and lose my job outright, and instead accepted reassignment to a job not requiring a clearance, at which point the review of my eligibility for a security clearance was terminated. DOE has maintained since 2000 that I "voluntarily transferred" to my new position in the Office of Foreign Visits. However, my decision not to challenge the reassignment was coerced and not voluntary.

In addition to the security clearance action taken against me, informally I was being advised that DOE was considering firing me, whether or not I appealed the security clearance decision. Although I believed the facts in this case clearly did not warrant removal, I was understandably alarmed that such an action was even being considered.

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[3] Although these forms were cited by DOE in suspending my clearance, they were illegal gag orders according to the terms of the anti-gag statute. Since 1988, Congress has passed an appropriations rider commonly referred to as the "anti-gag" statute. The statute bans spending by agencies to implement or enforce nondisclosure (gag) orders that do not specify that an employee's rights to disclose waste, fraud, abuse, or illegality and to communicate with Congress supersede the speech restrictions in the nondisclosure agreement. The current version can be found in Section 620 of the Consolidated Appropriations Act of 2005 (P.L. 108-447).

Meanwhile, in an effort to further retaliate for my disclosure and to chill future dissent, senior DOE managers unlawfully were making an example of me throughout relevant DOE offices in blatant violation of the Privacy Act and DOE policy. The letter suspending my access authorization, dated August 17, 2000, stated, "This letter has been marked "Official Use Only" to maintain the privacy of this matter between you and the United States Government." The letter also said that while my supervisor had been informed that my clearance was suspended, he had not been informed of the reason for that action. DOE Personnel Security Files (PSF) are required to be protected in the same fashion as classified information.

Despite this, I was informed by numerous staff members and coworkers that they were told by my second-level supervisor in open staff meetings, shortly after my reassignment to unclassified duties, that I was responsible for "a serious unauthorized disclosure of sensitive information to the press." Additionally, a professional colleague located outside the Washington, D.C. metropolitan area, told me that my second level supervisor telephoned him specifically to tell him that my clearance had been suspended for "a serious unauthorized disclosure of information to the press." The colleague asked my supervisor if the information was classified and the response was something to the effect, "that was still to be determined." Given the fact that the Report had been officially evaluated as UNCLASSIFIED almost five months earlier, this statement was false. This supervisor had handled DOE personnel security matters and PSF's for more than a decade and clearly was aware of the governing statutes and pertinent DOE policy. He knew the adverse impact his disclosures would cause. These blatant, unlawful smears directly resulted in irremediable damage to my reputation by creating an unwarranted perception that I was untrustworthy as a security professional.

I finally received a "Proposed Notice of Suspension" on February 28, 2001, more than eight months after forwarding the OIG Report. The primary stated basis in the "Proposed Notice of Suspension" for taking disciplinary action against me was that I made an unauthorized release of sensitive information, in violation of the signed "Security Responsibility Statement." (attachment 1)

On April 18, 2001, the Director of the Office of Security Affairs upheld the suspension in a memorandum issued to me, "Notice of Decision on Proposed

Suspension." The letter informed me that I was to be "suspended for fourteen (14) calendar days from your position of Security Specialist, GS-0080-15, for **insubordination as demonstrated by your unauthorized release of sensitive documents.**"[4] I served a suspension from April 22 to May 5, 2001.

DOE's own actions confirm the surreal irrationality of its stated excuse for yanking my clearance. On March 2, 2001, in response to my Privacy Act Request of October 31, 2000, **DOE provided to me the exact same *draft* OIG Report in question for "use of these documents as you deem appropriate."** It is simply ludicrous that DOE suspended my security clearance – effectively ending my career as a security professional – for disseminating to the media a draft OIG report considered to be "sensitive" and then only four months later DOE provided the identical draft OIG report to me without any restrictions.

V. The Office of Special Counsel – Unable to Enforce its Findings, Impotent on Issues that Matter

1. OSC Whistleblower Reprisal Complaint

After DOE provided its final decision on my suspension, I filed a whistleblower reprisal complaint on September 26, 2001, with the U.S. Office of Special Counsel (OSC). The OSC investigation of my whistleblower reprisal complaint determined:

1. The March 19, 1999 "Integrity of Security Operations" memorandum and attached "Security Responsibility Statement" constituted an illegal gag order;
2. DOE's imposition of a 14 day suspension without pay was determined to be excessive and retaliatory in nature.
3. My disclosure of the unclassified draft OIG Report was lawful and consequently, a protected disclosure under the Whistleblower Protection Act.

Although OSC's jurisdiction was limited and did not include the DOE security clearance apparatus, its findings are clearly relevant. **The fact pattern used by DOE as the basis for my security clearance suspension and two week employment suspension without pay were identical**. Accordingly, OSC's findings should have been

[4] DOE never disputed the two points that were critical to my disclosure of the OIG report. First, the information was not classified. Second, DOE never alleged that my motive for releasing the report was anything but constructive. The April 18 letter upholding my suspension stated, "While the concern you expressed for the well-being of the public is commendable, the information contained in the report was going to be published upon finalization, and, therefore, released in an authorized manner."

fully considered in the adjudication of my eligibility for a security clearance, but to my knowledge, they were not. OSC determined that the "Security Responsibility Statement" and "Integrity of Security Operations" memorandum were illegal gag orders. Accordingly, using these documents as the basis for information deemed to be "derogatory" in the adjudication of my eligibility for a DOE security clearance (as DOE informed me they were) was inappropriate and unlawful, as was the retaliatory investigation used to "catch" me blowing the whistle.

After removing the illegal gag orders from consideration, the only remaining factor – the use of another employee's name on the fax cover sheet – would be grossly discriminatory as a justification for removing my clearance and ending my DOE security career. Personnel holding security clearances routinely make far more serious mistakes, including criminal violations. I worked in the DOE Personnel Security Program for more than five years and know that the suspension of my security clearance was inappropriate and not consistent with established precedents. DOE personnel holding security clearances engage in extramarital affairs, fail to pay child support and alimony, report arrests for Driving Under the Influence (DUI), reckless driving, and theft (shoplifting) almost daily. I am aware of a specific situation where an individual holding a DOE security clearance hit and killed a pedestrian while DUI, retained a security clearance, was again arrested for DUI and had the security clearance reinstated in less than 18 months. In a directly relevant case, a current DOE senior executive security manager knowingly falsified his Personnel Security Questionnaire concerning his educational level and continues to hold a security clearance. Additionally, hundreds of DOE and contractor personnel have been granted security clearances after admitting numerous instances of illegal drug usage, including minor drug trafficking, signed "Drug Certifications" where they promise to refrain from illegal activity in the future have been granted security clearances. Finally, DOE has granted security clearances to convicted felons who have paid their debt to society, including lengthy prison terms and periods of parole.

In addition, my admittedly improper conduct was acknowledged by DOE to be an isolated incident by a long term employee (28 years of service) with an otherwise unblemished disciplinary record and consistent outstanding annual performance ratings.

The relevant CFR (10 CFR 710.7) states, "The decision as to access authorization is a comprehensive, common sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting or continuation of access authorization will not endanger the common defense and security and is clearly consistent with the national interest." DOE's suspension of my security clearance was not in accordance with the stated requirements.

Given all of these considerations, *retaliation* for blowing the whistle is the only possible rationale for DOE's decision to uphold the suspension of my security clearance for over five years. Indeed, that was the stated basis for the action. Unfortunately, the OSC had no authority to challenge this unlawful action.

2. Settlement with DOE

My whistleblower reprisal complaint to the OSC was resolved through a formal Settlement Agreement between DOE and myself in October 2003. DOE required that the terms and conditions of this agreement be subject to a nondisclosure clause. In my opinion, the sole purpose of the nondisclosure clause was to protect DOE from embarrassment and hide the fact that they unlawfully retaliated against me. The terms of the nondisclosure agreement expired on January 3, 2006, when I ended my DOE service. The terms of the agreement were as follows:

- I accepted a one day suspension – an appropriate remedy for using a co-worker's name on the fax sheet I sent to the media. The one-day suspension was not based on the disclosure of an agency document to the media.
- DOE demanded that I withdraw my OSC reprisal complaint and waive the right to file any additional claims based on DOE's retaliatory actions. This did not prohibit my right to challenge or appeal DOE's action on my security clearance.
- DOE included a provision that OSC not seek disciplinary action against any DOE employee for engaging in retaliatory actions against me.
- DOE was required to rescind the 14-day suspension, compensate me for lost pay plus interest, and restore all related benefits resulting from the rescission of the 14-day suspension, including accrual of annual and sick leave.

- DOE was required to expunge and destroy all documentary evidence, files, correspondence, memoranda, etc., related to my 14-day suspension based on the disclosure of the IG Report.

- DOE was required to recognize and acknowledge the requirements of the Anti-Gag statute (P-L 106-554, Sec. 622) and review the two illegal gag orders, memorandum on the subject of "Integrity of Security Operations" and the "Security Responsibility Statement" issued by the Director of the Office of Security on March 18, 1999, and any other subsequent gag orders enacted in the Office of Security.

- DOE was required to pay attorney's fees to my lawyers at the Government Accountablity Project within 30 days of the full execution of the Agreement.

- DOE was required to schedule a training entitled "Guide to Rights and Remedies of Federal Employees Under 5 U.S.C., Chapters 12 & 23, and the Whistleblower Protection Act" for supervisors in the Agency's Office of Security, Human Resources and the Inspector General, who were involved in retaliating against me.

While these terms were favorable, the OSC, under existing laws, was unable to enforce its findings of excessive retaliation on the only issue that mattered for my career – restoring my security clearance. In the end, OSC's positive intervention was limited to DOE admitting it was wrong and returning two weeks pay.

3. OSC Whistleblower Disclosure

While my two-week suspension was rescinded, the deficiencies in DOE's safeguards and security program were not. On January 15, 2002, I submitted a formal written whistleblower disclosure to OSC, which included the specific information provided to the media that served as the basis for DOE's suspension of my security clearance and two week employment suspension. On October 25, 2002, the OSC determined there was a "substantial likelihood" that the information contained in my disclosure constituted a substantial and specific danger to public health and safety. Significantly, this also means that my disclosure to the media was protected free speech under the Whistleblower Protection Act.

My whistleblower disclosure to OSC was 36 pages in length with 22 supporting attachments, alleging that DOE's active and passive misconduct represents gross mismanagement, gross waste, abuse of authority, and sustains a substantial and specific

danger to public health and safety. Some illustrations of the security deficiencies at DOE I challenged include:

- plans to fight terrorists attacking nuclear facilities that were limited to catching them on the way out, with no contingency for suicide squads that might not be planning to leave a facility they came to blow up;

- a policy that posted guards so far away from danger zones (and their weapons) that terrorists would have time to enter and leave – with nuclear bomb material – before even the fastest security forces would have time to respond;

- facilities that in some cases are not even as well protected as an ordinary ATM machine with video surveillance, meaning that protective forces would have to creep along walls and peer around corners while defending nuclear weapons facilities, like in 1930's spy movies;

- security inspectors with inadequate qualifications and therefore limited ability to detect security defects, such as gun ports in hardened guard towers installed backwards and left that way for years (this defect could essentially funnel terrorist bullets into the guard tower); and

- more generally, the passive resistance to change and loyalty to entrenched bureaucratic ruts at DOE that continue to endanger the country despite an overwhelming number of reviews urging security reforms.

The bottom line for my disclosures, which remains relevant today, is that DOE's security culture has left U.S. nuclear facilities with unacceptable levels of vulnerability to potential terrorist attack or sabotage.

OSC ordered the Secretary of Energy to investigate pursuant to 5 USC 1213 (c) (1). The DOE requested, and OSC approved, numerous extensions to the statutory 60 day deadline for DOE to investigate the disclosures. Finally, the Secretary of Energy provided the required report of investigation to OSC on May 29, 2003, more than 5 months beyond the initial deadline.

The report came in just as the Special Counsel who ordered it, Elaine Kaplan, was finishing her term. While not the topic of today's hearing, it is impossible not to note that in my experience the Office's performance disintegrated sharply as soon as she departed. To illustrate, I was not informed of the report's existence until July, even though the statute requires me to respond to the report within 15 days. I was not given the opportunity to see and respond to the report until December 2, 2003, more than six

months after DOE submitted it, and almost two years after initially filing a disclosure that identified numerous vulnerabilities and threats to U.S. national security.[5]

The 25-page DOE rebuttal states that nothing is wrong, that the allegations contained in my whistleblower disclosure are completely unfounded and that there is no substantial and specific danger to the public health and safety. The premise for this conclusion is that DOE policies are the baseline for an effective security system. The authors somehow then conclude that since my allegations describe contrary practices, I must be wrong. That begs the question. The point of my disclosure is that the paper policies are being systematically violated in the field.

The DOE report states that my disclosure contains outdated information and that numerous improvements have been made since my disclosure. In support, DOE accepted at face value reassurances from its Office of Independent Oversight, which compiled the report. But there is no basis beyond blind faith to accept those conclusions. The Office of Independent Oversight failed to offer any evidence to support the innocent verdict it gave itself, failed to interview the supporting witnesses I identified, and failed to disclose the methodology used to support its determinations, in violation of statutory requirements (5 USC Sec. 1213(d)).

Of course, some of the information in my whistleblower disclosure is dated and DOE has made some security changes that are unknown to me, because my security clearance was removed. This committee, however, does not have to accept my word as a basis for concluding that the majority of DOE's conclusions in its response to my disclosures are simply a whitewash of longstanding security deficiencies at DOE nuclear facilities. In the two and a half years since DOE concluded that all of my whistleblower disclosures were dated or unfounded, no less than a *dozen* subsequent, relevant reports, including GAO testimony before this subcommittee, have specifically corroborated many of the issues I raised in my January 2002 whistleblower disclosure. These include:

1. MAY 2003: GAO Report to the Chairman, Subcommittee on National Security, Emerging Threats, and International Relations, Committee on Government Reform, "NUCLEAR SECURITY: NNSA Needs to Better Manage Its Safeguards and Security Program," GAO-03-471;

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[5] It should be noted that there is no legal rationale for OSC to have sat on the DOE report for six months. OSC has never provided me with a reason for the delay.

2. JUNE 2003: U.S. DOE OIG, Audit Report on "Management of the Department's Protective Forces," DOE/IG-0602;

3. JUNE 24, 2003: GAO Testimony Before the Subcommittee on National Security, Emerging Threats, and International Relations, House Committee on Government Reform, NUCLEAR SECURITY: DOE Faces Security Challenges in the Post September 11, 2001, Environment," GAO 03-896-TNI

4. NOVEMBER 2003: U.S. DOE OIG, "Inspection Report on Reporting of Security Incidents at the Lawrence Livermore National Laboratory," DOE/IG-0625

5. NOVEMBER 2003: U.S. DOE OIG, Special Report on "Management Challenges at the Department of Energy," DOE/IG-0626

6. JANUARY 2004: U.S. DOE OIG, Inspection Report on "Protective Force Performance Test Improprieties," DOE/IG-0636

7. MARCH 2004: U.S. DOE OIG, Audit Report on "The Department's Basic Protective Force Training Program," DOE/IG-0641

8. NOVEMBER 2004: U.S. DOE OIG, Special Report on "Management Challenges at the Department of Energy," DOE/IG-0667

9. FEBRUARY 2005: U.S. DOE OIG, Inspection Report on "Security and Other Issues Related to Out-Processing of Employees at Los Alamos National Laboratory," DOE/IG-0677

10. MAY 2005: "NNSA Security, An Independent Review," conducted by Richard W. Mies, Admiral USN (Retired), et al.

11. JUNE 2005: U.S. DOE OIG, Inspection Report on "Security Access Controls at the Y-12 National Security Complex," DOE/IG-0691

12. JUNE 2005: U.S. DOE OIG, Inspection Report on "Protective Force Training at the Department of Energy's Oak Ridge Reservation," DOE/IG-0694

I won't belabor the subcommittee by detailing point-by-point the evidence in each report which renders the DOE rebuttal to my disclosure inaccurate and meaningless. I provided the Office of Special Counsel with four detailed- sets of additional comments after the DOE report was submitted. Suffice it to say that I believe any objective and reasonable person evaluating my whistleblower disclosures, the DOE rebuttal concerning

my disclosures, and the subsequent, directly relevant reports cited above would find the DOE report seriously lacking in credibility.

The most telling examples come from one of the most recent, and in my opinion, the most comprehensive and credible of the reports listed above. The internal NNSA security review by Admiral Richard Mies (USN, Retired), concluded:

> **"Of greatest concern, our panel finds that past studies and reviews of DOE/NNSA security have reached similar findings regarding the cultural, personnel, organizational, policy and procedural challenges that exist within DOE and NNSA. Many of these issues are not new; many continue to exist because a lack of clear accountability, excessive bureaucracy, organizational stovepipes, lack of collaboration, and unwieldy, cumbersome processes. Robust, formal mechanisms to evaluate findings, assess underlying root causes, analyze alternative courses of action, formulate appropriate corrective action, gain approval, and effectively implement change are weak to non-existent within DOE/NNSA.**
>
> **Accordingly, our panel strongly recommends that NNSA continue to work within DOE to develop, with urgency, a more robust, integrated DOE/NNSA-wide process to provide accountability and follow-up on security findings and recommendations...**
>
> **NNSA has accomplished many of its stated goals...but its culture still reflects many of the long-standing negative attributes of DOE. NNSA is plagued by a number of cultural problems that, until addressed, will erode its ability to establish and provide security consistent with the gravity of its mission:**
>
> - **Lack of a team approach to security**
> - **Disparate views and an underappreciation of security across the enterprise, such that security is not full embraced as integral to mission.**
> - **Ingrained organizational relationships that inhibit an enterprise approach to security**
> - **A bias against training**
> - **An over-reliance on a compliance-based approach to security rather than a more balanced approach using performance-based standards**
> - **Lack of trust in the security organization**
> - **An absence of accountability."**

Juxtaposed with the analogous, now 6-year-old findings in the *1999* PFIAB Report quoted above, the conclusions in the Mies Report are deeply troubling. Along with these general conclusions, the Mies Report specifically corroborates many of the same critical issues I identified in my whistleblower disclosure almost 4 years ago, in some cases word for word. These include the lack of necessary qualifications of security personnel, a lack of centralized security oversight, a flawed vulnerability assessment and performance test process that provides "a false sense of security," and a general lack of protective force capability resulting in numerous exploitable vulnerabilities for a determined terrorist adversary.

An important illustration of this is DOE's unmistakable denial of an issue central to my whistleblowing: its post 9/11 failure to prepare for "worst-case" threat scenarios, such as suicide terrorist squads intent on detonating nuclear material, rather than stealing it. These "ssabotage" scenarios are far more difficult to defend against than theft because escape is not required, there is less exposure to protective forces, and the terrorists are assumed to be suicidal or willing to die. Still, the bottom line is that when national security is at stake, credible tests must be conducted and effective plans must be in place. DOE has failed to do this, instead denying that the most well-known terrorist tactic is a problem. Consider a directly related concern about inadequate recapture/recovery capability expressed in my OSC whistleblower disclosure (Feb. 2002), followed by DOE's documented dismissal of the concern in May 2003, and finally the Mies Report's findings on the exact same issue in May 2005:

Levernier OSC whistleblower disclosure, February 2002:

> "DOE consistently fails to performance test recapture recovery capability. When the adversary goal is to create an improvised nuclear device or radiological sabotage, escape is not required. Accordingly, DOE requires that all site protective forces possess the capability to reenter facilities under adversary control and recapture the asset. DOE Order 470.1 Chapter I, states, "Should denial and /or containment fail, a recapture/recovery or pursuit strategy would then be required. Forces shall be capable of rapid reaction in implementing recapture or recovery contingencies.
>
> This is a tactically difficult, high risk, operation that must be accomplished quickly, in order to deny the adversary time to complete their goal [i.e. the detonation of an improvised nuclear device!]....DOE's failure to test this

component of their protection strategy provides no assurance of adequate protection from this critical threat.

DOE requires that nuclear facilities possess the capability for mechanical and/or explosive reentry to assist in the timely interruption of an adversary force. Site Fire Departments (not protective forces) at two facilities are assigned this critical security responsibility. Other DOE facilities have not addressed this requirement and it has not been performance tested.

DOE should take immediate steps to ensure that recapture/recovery capability is performance tested at all facilities and ensure that recapture /recovery is tested routinely hereafter. DOE policy should be revised to require that recapture/recovery capability be performance tested annually, at a minimum."

DOE rebuttal to Levernier disclosure, May 2003:

"Due to deficiencies and gaps in the force-on-force performance exercises, the claimant alleges that DOE is not adequately prepared to defend the facilities against such an attack [i.e. detonation of improvised nuclear devise, dirty bomb]. According to the informant, these deficiencies violate DOE Order 470.1, which requires that the protective force be capable of rapid reaction in order to recapture a DOE asset or stop a sabotage attack.

All DOE sites have a recapture/recovery program as required by Departmental directives. The DOE sites test this recapture/recovery capability.

The claimant is correct in his observation that these types of activities are difficult and dangerous situations. The protection strategies for DOE sites are designed to prevent the site from being placed in a situation where recapture/recovery is needed. Thus, the focus of training is on ensuring that these conditions will not occur. However, DOE does run tests that presume the site has failed in its main goal and must, therefore, perform a recapture/recovery operation. The claimant is apparently not aware of the level of emphasis in these exercises, as several changes to the tactical protection strategies at DOE sites have been made based upon performance test results.

The recent testing by the Independent Oversight Office has placed increased emphasis on recapture/recovery, while still ensuring the major focus is on preventing a site from getting into a situation that would require this effort. These changes in tactical protection strategies, combined with additional training and oversight, have increased the level

of assurance that the DOE can successfully accomplish this difficult mission...

...DOE sites have demonstrated their ability to protect against this threat. The DOE is confident that its protective forces are capable of rapid reaction to implement recapture/recovery actions."

Finally, the findings of the independent Mies Report echo the allegedly dated claims, two years after DOE's dismissal, in May 2005:

"Site Recapture and Recovery (R&R) plans are nonexistent or inadequate. The sites explain that they focus on a denial-of-access strategy. Denial of access is the primary mission of NNSA sites, and resources and efforts should be dedicated to developing robust denial strategies. However, some sites' reliance on the viability of their denial strategies has precluded them from adequate planning, training, and procurement of appropriate tools for R&R should denial fail.

Some sites' R&R plans incorporate a denial-of-access strategy that inappropriately assumes they will never lose control of the facility. If adversaries gain access to a facility or leave with material, R&R programs are critical. Furthermore, the new DBT policy established site responsibility for instituting an R&R program.

SSSPs and some facility response plans address R&R programs and plans, but they vary widely, and some do not fulfill the need for a timely, effective, and viable R&R capability or meet the intent of DOE Manual 473.2-2. Some approaches include R&R response activities and requirements (spread throughout different response documents) but do not identify one specific response plan for R&R of an SNM storage facility or material in un-authorized control.

Other R&R approaches include tactical options that are rudimentary, very high risk, and not tactically viable. For example, the mechanical and electronic entry techniques used at some sites have not been performance tested or fully evaluated for their effectiveness, and, during iterative site analysis (ISA) processes or OA inspections; some of these techniques have failed testing. DOE Manual 473.2-2 states that when mechanical entry alone will not meet required response times, the site or facility must develop an explosive tactical entry capability...

Although the elements of response plan training and testing are critical to effective R&R programs, very few sites have conducted actual training or testing, and those that have use tabletop activities or walk-through drills.

> Adversary capabilities continue to increase, but NNSA threat planning lacks dedicated offensive response teams for each site to meet these threats. The manpower-intensive denial-of-access strategy requires numerous protective force personnel dedicated to a material access area in a repel-type posture. Sites say that the resources committed to this effort prevent them from assigning an offensive force as a dedicated, ready, and equipped element for R&R response activities."

I have attached a chart that compares similar DOE responses to my whistleblower disclosures with relevant sections in the Mies report. (attachment 2) Issues which the DOE determined were unfounded or dated two years ago still have not been addressed.

After wavering over DOE's denials for over two years, on February 2, 2006, OSC finally completed its review of my whistleblowing. Special Counsel Scott Bloch concluded in a letter sent to President Bush and to DOE's oversight committees in Congress, "The information [Levernier] presented casts doubt upon [DOE's] confident expression of its readiness to defend the nuclear research facilities and nuclear assets within its custody." (attachment 3) In essence, Special Counsel Bloch vindicated the overall substance of my whistleblowing. However, he refused to demand corrective actions from DOE. Moreover, he refused to even meet a requirement of the Whistleblower Protection Act to evaluate the DOE report, instead writing to the President that he is "unable to determine whether [DOE's] findings appear reasonable." The OSC is required by the WPA to reject an agency's report if it doesn't adequately resolve a whistleblower's complaint. My attorney at the Government Accountablity Project (GAP) tells me that this is the first time in GAP's experience monitoring the implementation of the WPA that a Special Counsel has failed to meet the statutory requirement to "determine whether the agency report is reasonable."

Conclusion

If DOE denies everything and the Special Counsel simply washes his hands, issues a press release, and looks the other way, where exactly is a whistleblower supposed to turn? The obvious answers must include Congress and the public. It is unlikely that DOE will ever abandon its longstanding approach of denial for any alleged security problems without some sort of congressional intervention and public pressure.

Congress needs to assure the freedom to warn for concerned individuals like myself who attempt to address security vulnerabilities. But, that will happen only as the exception if the whistleblower law continues to leave us defenseless against security clearance harassment even for unclassified disclosures of dangerous government mismanagement. Closing that Whistleblower Protection Act loophole would be an important step in providing genuine rights for those who take their national security responsibilities seriously.

Mr. SHAYS. Thank you, Mr. Levernier.

We have Mr. Weldon, who really, given that he is not a member of this subcommittee, would come last. However, what I am going to do is I am going to exchange my time with him and give him my time, and then I will take his time at the end.

Mr. WELDON. Mr. Chairman, I want to thank you again, and I want to thank——

Mr. SHAYS. And let me state for all Members, we are going to have 10 minutes so we can get into the issues.

Mr. WELDON. I want to thank Mr. Waxman and Mr. Kucinich and the rest of the subcommittee members. I am well aware of their efforts, and I could not think of a more important hearing that could be held by this subcommittee.

This is my 20th year in Congress, and I have served with both Republican and Democrat administrations. If we do not fix the problem of people who have stories to tell that are important for our security, who simply want to tell the truth, then we are sending a signal to every other employee of the Federal Government not to speak up. I am not talking about giving away State secrets or doing things maliciously. I am talking about problems that we need to understand as elected officials and as agencies to deal with to improve our ability to respond to concerns.

Now, my focus has been in armed services and homeland security. I serve as vice chairman of both committees, and the people that I mentioned today, Mr. Chairman, each have a story in their own right, and I do not have time to go into them all. I would ask your staff to look at them all. But all of them over the past 20 years have one common thing that has occurred to them: Their lives have been ruined. In some cases, they have been caused to go bankrupt. In other words, they have destroyed their professional stature and credibility. Some have gotten out because they have taken the signal: It is time for you to leave because, as with Dr. Gordon Oehler, who was the CIA Non-Proliferation Director, when he told us that we had the same intelligence that Israel had, Iran was going to build the Shahab-III missile system with the help of Russia, he made the mistake of telling us the truth. As a result, he was railroaded out of his job, and today we all know Iran has the Shahab-III missile system. But because Gordon Oehler simply told us and confirmed what Benjamin Netanyahu of Israel was saying at the time, he paid the price.

Now, as a member who oversees defense issues, it really offends me that our military people that I deal with—and I don't know the details of these other cases—would have their careers ruined because they simply want to tell the truth to help us understand problems in the services. And yet that is what has occurred and, unfortunately, what continues to occur.

If we allow this to go unchecked, we send a signal to everyone who wears the uniform, and our military personnel take their oath seriously when they salute to protect and uphold the laws of the country and their duty and honor and country seriously. And when they see us not respond when they tell the truth, that sends a signal to everybody else: Don't do that because you will suffer the same fate as, in this case, Tony Shaffer.

Mr. Chairman, I want to go through some examples of the outrageous actions of the Defense Intelligence Agency with Mr. Shaffer, so, Mr. Shaffer, would you answer some questions for me? In your file, have you received letters of commendation from a number of DIA Directors? Please name them for me.

Colonel SHAFFER. Sir, over my 10 years at DIA, I received from Director of DIA Lieutenant General Pat Hughes, Vice Admiral Tom Wilson, and several of their subordinate officers to include compliments for my three briefings to the Director of Central Intelligence George Tenet, which I think everybody might note it is unusual for a junior field officer to brief the Director of Central Intelligence on his personal—on the operations he is running.

Mr. WELDON. Lieutenant Colonel Shaffer, are you not also the recipient of the Bronze Star?

Colonel SHAFFER. Yes, sir. I received that from my first deployment to Afghanistan in support of both Joint Task Force 180 and Joint Task Force——

Mr. WELDON. And how long have you served in the military as an intelligence officer?

Colonel SHAFFER. As an intelligence officer, approximately 22 years, total about 24 years.

Mr. WELDON. Without going into detail, you were embedded in Afghanistan. Tell us what you can in the unclassified setting of your role there.

Colonel SHAFFER. The setting, sir, the environment?

Mr. WELDON. What were you doing there?

Colonel SHAFFER. I was overseeing all of DIA's human intelligence collection operations on the ground going on in Afghanistan during the period I was there.

Mr. WELDON. You were undercover, under an assumed name?

Colonel SHAFFER. That is correct, sir.

Mr. WELDON. But you had been involved with this program you called Able Danger, correct?

Colonel SHAFFER. That is correct.

Mr. WELDON. And that was authorized by the chief of the General's staff, General Shelton?

Colonel SHAFFER. Yes, sir. The chairman of the Joint Chiefs authorized it, yes, sir.

Mr. WELDON. And it was carried out by the Commander of Special Forces, General Schoomaker.

Colonel SHAFFER. Yes, sir.

Mr. WELDON. In the 1999–2000 timeframe.

Colonel SHAFFER. That is the beginning of it, yes.

Mr. WELDON. What was the purpose of Able Danger?

Colonel SHAFFER. As I said in my testimony earlier, sir, it was to first detect, fix by figuring out where they are all located, and then go after, using offensive methodology, the structure of al Qaeda—not bin Laden himself, but the structure, the al Qaeda mechanisms, cells, etc.

Mr. WELDON. Who was the commander on the scene of Able Danger, and what was his name?

Colonel SHAFFER. Sir, General Peter Schoomaker was Commander of Special Operations Command.

Mr. WELDON. Under him?

Colonel SHAFFER. Below him was his J3, General—oh, goodness.

Mr. WELDON. Who was the day-to-day commander, Navy Intelligence?

Colonel SHAFFER. Oh, the day-to-day oversight of Able Danger was conducted by Captain Scott Philpot. He ran Able Danger day to day.

Mr. WELDON. An Annapolis grad?

Colonel SHAFFER. Yes, sir.

Mr. WELDON. Still in the Navy?

Colonel SHAFFER. Yes, sir.

Mr. WELDON. About ready to take command of one of our destroyers?

Colonel SHAFFER. The LaSalle, yes, sir.

Mr. WELDON. The LaSalle. In a month or so?

Colonel SHAFFER. Yes, sir.

Mr. WELDON. And he will be a witness tomorrow, but he is testifying in a closed session because he also has concerns.

What did you find out in your work looking at al Qaeda in January 2000?

Colonel SHAFFER. Well, sir, in January 2000, I took a chart that Special Operations Command requested from the Land Information Warfare Activity, which linked together the global al Qaeda structure. Within that chart, I observed, and others subsequent to me did observe as well, Atta, one of the primary hijackers of the September 11th attack. It was that chart which was the basis for the beginning of work of Special Operations Command to look at the global al Qaeda infrastructure.

Mr. WELDON. Are you aware there are at least seven other people who testified under oath that they also identified Mohamed Atta——

Colonel SHAFFER. Yes, sir, I am aware of——

Mr. WELDON [continuing]. Both by name and by face?

Colonel SHAFFER. I am aware of that fact, yes, sir.

Mr. WELDON. In September 2000, what did you do because you had been working with FBI on some other top secret programs?

Colonel SHAFFER. I was actually requested by the FBI to conduct a parallel operation which would have assisted them in going after a European-based terrorist group, which they have since then eradicated. I will not go into it here.

We attempted, because of my relationship with the FBI special agents on that project, to broker a transfer of information relating to the Able Danger project from Special Operations Command to WFO, Washington Field Office of the FBI here in Washington.

Mr. WELDON. How many times?

Colonel SHAFFER. By my count, three—twice by my deputy, once by me.

Mr. WELDON. Were the meetings all set up by the FBI?

Colonel SHAFFER. They were set up by the FBI with the WFO office, which oversees the bin Laden investigation.

Mr. WELDON. Did those meetings take place?

Colonel SHAFFER. No, they did not.

Mr. WELDON. Why not?

Colonel SHAFFER. My understanding is they were canceled by the Special Operations Command legal advisors to the Command.

Mr. WELDON. So we had information about the Brooklyn cell of al Qaeda with Mohamed Atta, and we could not transfer it to the FBI.

Colonel SHAFFER. That's correct.

Mr. WELDON. What has Louis Freeh recently said about that information?

Colonel SHAFFER. My recollection of his articles in the open press is that it is his belief that had we, the Able Danger team, been able to provide that information regarding Atta and the other members, ostensible members of the Brooklyn cell, he may well have been able to use the FBI to prevent the September 11th hijackings.

Mr. WELDON. Now, General Shelton has come out and publicly said in a recent article that he actually authorized the creation of Able Danger. Is that correct?

Colonel SHAFFER. December. Yes, sir, he did.

Mr. WELDON. Now, we all—at least I did—supported the creation of the 9/11 Commission. The 9/11 Commission was supposed to look at the details leading up to September 11th. You were on duty in Afghanistan October 2003. Tell us about who went through Bagram that you were made aware of.

Colonel SHAFFER. I was made aware of Dr. Philip Zelikow, the staff director of the 9/11 Commission, and three staffers showing up. They put out word. They requested anyone come forward who had information regarding any pre-September 11th intelligence.

Mr. WELDON. And you met with him?

Colonel SHAFFER. I was authorized by my chain of command, my Army chain of command, to meet with him and provide them a secret-level briefing on a project that we now know as Able Danger.

Mr. WELDON. But you made a mistake. What was your mistake?

Colonel SHAFFER. Well, I——

Mr. WELDON. You didn't call the folks where?

Colonel SHAFFER. I notified DIA upon my return to the United States of my discussion of Able Danger and the related intelligence failures.

Mr. WELDON. Were they unhappy?

Colonel SHAFFER. Well, they did not say it outright, but the way they responded to me after I told them about the disclosure and the fact that the 9/11 Commission may recall me to testify more was not pleasant.

Mr. WELDON. So when you got back, you tried to meet with the 9/11 Commissioners because you met with Zelikow, and what did they say?

Colonel SHAFFER. I contacted them twice in January 2004. The first time they said, "We remember you. We will ask you to come in. Stand by." I did not hear anything back from them for a week. I call again, and the second time they said, "We do not need you to come in now. We found all the information we need on Able Danger."

Mr. WELDON. Now, Colonel Shaffer, an article appeared last week. Dr. Zelikow was interviewed, and he was supported in his statement by Senator Bob Kerrey, who was a member of the 9/11 Commission. Have you read that article?

Colonel SHAFFER. I have read it, sir, yes.

Mr. WELDON. In there Dr. Zelikow said he never met you. What do you say to that? You are under oath right now.

Colonel SHAFFER. Yes, sir. I did meet with him. I specifically have a business card he provided me.

Mr. WELDON. Do you have the business card with you?

Colonel SHAFFER. I do not have it on me this moment.

Mr. WELDON. You will present that for evidence tomorrow before the Armed Services Committee?

Colonel SHAFFER. Yes, sir, I will.

Mr. WELDON. Who gave you that business card?

Colonel SHAFFER. Dr. Phillip Zelikow in a private meeting in Bagram, where he approached me after my briefing on Able Danger and said, "What you have said today is very important. We need to continue this dialog upon your return to the United States. Please call me."

Mr. WELDON. Yet Dr. Zelikow is now saying publicly he never met you.

Colonel SHAFFER. I find it hard to believe, sir, that he could not remember meeting me.

Mr. WELDON. When you came back to Washington, your career started to take a turn for the worse. Am I correct?

Colonel SHAFFER. Yes, sir. The allegations which we have talked about today were brought up against me.

Mr. WELDON. They pulled your security clearance?

Colonel SHAFFER. Yes, sir.

Mr. WELDON. Mr. Chairman, the lengths they went to with this man are unbelievable. Let's talk about the things besides the charge to—are you aware of what was told by DOD officials, DIA officials, to Wolf Blitzer and Brian Bennett, both top-rated national reporters? What did they say about you?

Colonel SHAFFER. Mr. Blitzer, during my stint on his show, "The Situation Room," actually told me that DIA or someone in DOD had put out information regarding me having an affair with someone on your staff and related allegations that somehow I was not being honest in presenting the information regarding the September 11th——

Mr. WELDON. Have you ever had an affair with anyone from my staff, male or female?

Colonel SHAFFER. No, sir, not remotely anytime.

Mr. WELDON. But that was what DIA said.

Colonel SHAFFER. They were alluding to DIA putting this out, yes, sir.

Mr. WELDON. And you also got a letter from DIA in September taking away permanently your security clearance, correct?

Colonel SHAFFER. That actually came in November after we appealed, but yes, sir, they did.

Mr. WELDON. And they said you would never have access to any classified documentation again.

Colonel SHAFFER. That was the intent, to remove both my top secret and collateral secret clearance, which means I would have no access.

Mr. WELDON. Did you receive a box from DIA several weeks later.

Colonel SHAFFER. I received a total of seven boxes from DIA.

Mr. WELDON. What was in those boxes?

Colonel SHAFFER. Not only was there a GPS, Government-owned $400 GPS and related software, there was a total of five classified documents which they had not removed.

Mr. WELDON. So DIA, after telling you your security clearance was removed, sent you five classified documents.

Colonel SHAFFER. According to my understanding of the law, it is a violation by sending someone classified information via the mail who is not authorized to receive it.

Mr. WELDON. Was there also mail in there from other employees of DIA?

Colonel SHAFFER. There was a year's worth of mail from some unknown employee to include bank statements and a check.

Mr. WELDON. Was there Federal property in there that did not belong to you that they sent you?

Colonel SHAFFER. As I mentioned, there was a GPS valued at over $400, and my estimate was there were about $600 worth of Government material, which is well in advance of the $250 I was accused of wrongly acquiring.

Mr. WELDON. Was there not also a bag of pens, U.S. Government pens in there?

Colonel SHAFFER. There was a bag of 20 U.S. Government pens.

Mr. WELDON. And what had they accused of publicly that you referred to earlier of having taken—and I believe it was when your father worked for one of our——

Colonel SHAFFER. The U.S. Embassy. Yes, sir, I——

Mr. WELDON. Your father worked for the U.S. Embassy. And what did DIA go to the length to accuse you of?

Colonel SHAFFER. Of taking Government pens while I was 13 years old to use in high school and give them to my friends.

Mr. WELDON. They accused this man of taking Government pens when he was 13 years old as a part of their official effort to destroy him, and then they sent him a bag with 20 pens in a box after they removed his security clearance.

Colonel SHAFFER. Skilcraft pens clearly marked as U.S. Government pens.

Mr. WELDON. Mr. Chairman, these agencies are out of control. These things would be humorous, except you are talking about a man's life.

How close were you to having the benefits taken away from you and your kids?

Colonel SHAFFER. Within days, sir. As a matter of fact, we thought the paperwork had already moved forward before Under Secretary of Defense England was able to intercede.

Mr. WELDON. Because you did what? What was your crime?

Colonel SHAFFER. Sir, as far as I can tell so far, based on the fact we have been able to refute the allegations against me, it is because I spoke up and tried to tell the truth regarding pre-September 11th intelligence.

Mr. WELDON. You told the truth.

Colonel SHAFFER. Yes, sir.

Mr. WELDON. Mr. Chairman, if we don't——

Mr. SHAYS. With that, we will end on that.

Mr. WELDON. If we don't take action, we are all in trouble.

Colonel SHAFFER. Thank you, sir.

Mr. SHAYS. I thank Mr. Weldon for his questions. Thank you for your responses.

Colonel SHAFFER. Thank you, sir.

Mr. SHAYS. We gave Mr. Weldon an extra 2 minutes, so he had 12, and Mr. Waxman, you have 12 minutes.

Mr. WAXMAN. Thank you very much, Mr. Chairman, for your fairness. I do not know if I will take the full 12, but I do want to pursue some questions, and I want to start with Sergeant Provance.

I have gone through your detailed written statement. Your oral statement was fairly brief. And the abuses you reported are really shocking to me. It is also very troubling that the Pentagon's investigation seemed designed to ignore the evidence that could point to the higher-ups.

Let me first ask you about some of the abuses you tried to report. We have heard accounts of detainees being humiliated and forced to wear women's underwear. We have also seen the horrible pictures of detainees stripped naked, wearing hoods, and chained in barbaric positions. This was all at Abu Ghraib.

Can you tell us whether interrogators you knew used these techniques?

Specialist PROVANCE. Yes, sir, every interrogator I spoke to would confirm these kinds of things. My job as a system administrator at the prison allowed me to speak to various, interrogators and analysts at their work stations, troubleshooting their computers or, you know, setting their computers up. From day one it was a very intriguing operation, and I wanted to know what it was like to be an interrogator and exactly what they were doing.

Mr. WAXMAN. How common were these practices at Abu Ghraib?

Specialist PROVANCE. As far as nakedness and the use of dogs and using loud music, starvation, and what-not, those were considered normal. These things were said to me as something they did commonly.

Mr. WAXMAN. I noticed in your written testimony there were a lot of names of officials whose names were redacted. Were these names of officials who were involved in these practices? And who blacked out these names?

Specialist PROVANCE. I would have to take that statement by statement, sir, but the Department of Defense had those redacted sir.

Mr. WAXMAN. OK. I have an article here dated May 20, 2004, from the Sacramento Bee. It quotes General Richard Sanchez denying that he authorized sexual abuse, sleep deprivation, dietary manipulation, the use of dogs, or stress positions. Are you saying that these tactics were authorized?

Specialist PROVANCE. General Sanchez came to the prison on different occasions, and at the prison these very measures themselves were put on a sign that was as big as a billboard inside the Joint Interrogation and Debriefing Center [JIDC], as it is referred to. And if anybody of any importance came to the prison, the one place they would come is the JIDC, which was a singular building and not, you know, sprawling over the prison. I know he came to this facility. So if he saw this billboard, which actually clearly states

that they would need his approval if used, if he did not approve of them or if he did not even see them as something to ever approve, I think he would have had a problem with it within, you know, that very minute and had this board removed.

Mr. WAXMAN. How big was this billboard?

Specialist PROVANCE. It was bigger than this television, sir.

Mr. WAXMAN. And on the billboard it said?

Specialist PROVANCE. Well, on the left side it had the traditional names of approaches for interrogators that are considered textbook. Then to the right side you had the extra measures, which had to do with the use of dogs and dietary and environmental manipulation.

Mr. WAXMAN. So it was all written out very clearly on a billboard at the facility?

Specialist PROVANCE. Yes, sir. And not only that, but just as when Red Cross came to visit and they had seen a lot of the things, such as the nakedness, that they clearly had disapproval of, I don't see them hiding these things from him more than they did for the Red Cross.

Mr. WAXMAN. Let me ask you about another abuse. We have press reports about interrogators who used the children of detainees to break the will of their parents. Did you receive any information about cases like this?

Specialist PROVANCE. Yes, sir, I did. The one interrogation I was a part of involved a 16-year-old son of a general whom they said had already been broken.

Mr. WAXMAN. An Iraqi general?

Specialist PROVANCE. Yes, sir. I was the analyst and security for this interrogation, and just based on the questions alone, as well as his answers to these questions, he had nothing to do with anything directed against, you know, American soldiers. So he was not a suspect in any way, shape, or form. And the interrogation itself had to do with just asking him things he had heard. You know, so the only crime, as it were, that he may have committed was just being the son of this general, but as I——

Mr. WAXMAN. What did they do with his son?

Specialist PROVANCE. Well, as I came to find out, sir, originally we were going to interrogate the general, but we were told he had already been broken. And the interrogator was told he had been broken by using his son, you know, by splashing cold water on him, and it was very cold at the time itself, and driving him around in the back of Humvee, placing mud upon him, and then having his father thinking that he is going to see his son, you know, was allowed to see him in the state, and then that is what broke the general.

Mr. WAXMAN. Had the child done anything wrong?

Specialist PROVANCE. No, sir. No, sir. And actually tried to plead his case because he was in the general population where the MPs had already told me the detainees were raping each other and——

Mr. WAXMAN. Was there any legitimate reason to keep him in prison?

Specialist PROVANCE. No, sir.

Mr. WAXMAN. Do you think this practice was repeated with other children?

Specialist PROVANCE. I don't see why it would not have been, sir. It wasn't something they were trying to keep quiet about or even said to keep secret.

Mr. WAXMAN. Were people bragging about using children to break the parents?

Specialist PROVANCE. No, sir.

Mr. WAXMAN. They were not bragging about it, but they commented that they had used children?

Specialist PROVANCE. Yes, it was just given as an explanation.

Mr. WAXMAN. Your testimony has some other examples. A prisoner forced to use an MRE bag as a loincloth, guards having late-night parties with Robitussin and Vivarin pills, and female interrogators who got a thrill out of humiliating male prisoners.

What is amazing is that it seems like everybody knew about it. Nobody was surprised when those pictures came out. Is that what you are saying, that people seemed to know about these practices?

Specialist PROVANCE. Yes, sir.

Mr. WAXMAN. Let me turn to your attempts to report these abuses through your chain of command. You were interviewed on May 1, 2004, by General Fay. In your testimony, you say he did not want to hear about abuses by military intelligence. What happened when you tried to tell him about the involvement of intelligence officials?

Specialist PROVANCE. After basically forcing my testimony on him that had nothing to do with his prior questioning, he pulled out my original CID statement from January 2004 and quoted me saying where I was glad that there was an investigation and saying, you know, because of what was going on was shameful at the prison. And after reading this back to me, he then says he is going to recommend administrative action against me. So, you know, the feeling I got—I mean, his whole mood and demeanor had changed at this time and——

Mr. WAXMAN. He was asking you questions about something else, but you volunteered this information because you thought he ought to know about it. Is that right?

Specialist PROVANCE. Yes. He had only asked about the MPs and the photographs and anything that I had explicitly seen. But I tried to volunteer information of, you know, things that I had heard from not just rumor but from the participants themselves. And he clearly——

Mr. WAXMAN. So he was doing an investigation about the reports about Abu Ghraib?

Specialist PROVANCE. Yes.

Mr. WAXMAN. Reports about prisoner abuse, but when you talked to him about intelligence officials being involved, he did not—he reacted in a very negative way.

Specialist PROVANCE. Yes.

Mr. WAXMAN. Did he ask questions to find out more?

Specialist PROVANCE. No, he didn't. He just said, "Tell me what you"—you know, "tell me what you have heard." And so I told him, and his assistant documented it. But he didn't ask me anything on, you know, what I had said.

Mr. WAXMAN. What was your impression? Did you think he was trying to keep you quiet?

Specialist PROVANCE. Yes.

Mr. WAXMAN. So when you were contacted by the press and asked for your views on the investigation, you went ahead and talked to them. Was the interview with General Fay the tipping point for you? Did it change things in your view?

Specialist PROVANCE. Yes, it did. By that time I had already tried to tell them what was going on, and I got the impression that they didn't—they weren't going to act on that. They weren't going to do with that, and that anything that I had to say was just going to, you know, be avoided or ignored. And the only persons at that time I felt really wanted to do anything about it was the media. And they had already been wanting to talk to me for quite a while, and that was the only avenue I felt I had.

Mr. WAXMAN. You did not see any use in talking to General Fay or other people in the military because they were not receptive to the information? Is that what you are telling us?

Specialist PROVANCE. Yes, sir.

Mr. WAXMAN. Your security clearance was suspended. Was it suspended for disclosing classified information, or was it suspended for talking to the press about unclassified information?

Specialist PROVANCE. It was suspended for disobeying the order to not speak about Abu Ghraib to anybody.

Mr. WAXMAN. Did you reveal any classified information?

Specialist PROVANCE. No, sir.

Mr. WAXMAN. OK. Your commanders issued a written order directing you not to talk to the press about what you saw at Abu Ghraib, regardless of whether it was classified or not. But in your statement you say that you could not find anybody else who got an order like that. Why were you the only one who got a written gag order?

Specialist PROVANCE. Because I think everything I had to say was contrary to what the prosecution was trying to get everyone to—you know, basically the theory is that this was the work of a few bad apples, it is only these MPs and these photographs on this night when these photographs were taken. And, you know, I would say it wasn't just these few people, that it was the whole operation.

Mr. WAXMAN. Do you know of anybody else who got a gag order?

Specialist PROVANCE. No, sir.

Mr. WAXMAN. Let me go back to that article I talked about in the Sacramento Bee from 2004. The story quotes you as reporting abuses, but it also quotes General Sanchez denying that he authorized these tactics. Clearly, General Sanchez did not receive a gag order like yours. So the bottom line is you can talk about an ongoing investigation as long as you deny wrongdoing, deny that abuses take place, deny that the abuses were directed by higher-ups; but if you take the opposite view, you are banned for speaking out. Is that a conclusion that one could reach? Because he did not get a gag order for his reports to the press.

Specialist PROVANCE. Yes, sir.

Mr. WAXMAN. I would like to request the Chair's indulgence for just 30 seconds more to close out this line of questions. Sergeant Provance, you flew all the way from Europe to be here today, and I have a short video clip I would like to play to get a reaction. This

is from a speech by General Pace, the chairman of the Joint Chiefs of Staff, on December 1, 2005. I wonder if we can roll the clip.

[Videotape played.]

Mr. WAXMAN. So that clip pretty much illustrated that the General, head of the Joint Chiefs of Staff, is urging you and others in the military and come back home and tell people what is really going on Iraq, but you were singled out and specifically ordered not to do that. So I would like to ask you: In your personal opinion, do you think the military has adequately investigated the abuses at Abu Ghraib?

Specialist PROVANCE. No, sir.

Mr. WAXMAN. Do you think there was a coverup?

Specialist PROVANCE. Yes, sir.

Mr. WAXMAN. Mr. Chairman, I just want to make a request of you. I know our staffs spoke about this before the hearing, so I wonder if you would be willing to join me in a document request related to Sergeant Provance's testimony today. In my opinion, there are two areas the committee should investigate further: First, I think we should examine some of the substantive reports Sergeant Provance made particularly regarding the extent to which innocent children would be used as part of the interrogation process. And, second, I think it makes sense to investigate the circumstances surrounding Sergeant's Provance's gag order and disciplinary action. I would like to ask you if you would join with me in making a document request on these issues.

Mr. SHAYS. First, I would be delighted to work with you on this issue and to make whatever requests we need to.

I just want to say to you, Specialist Provance, it takes a tremendous amount of courage with your rank to tell a General what they may not want to hear, and people like you will help move our country in the right direction. And so this full committee thanks you for what you have done.

If I could just ask this question, because I want to make sure the record is clear so we do not have pushback from the military. When you were meeting with General Fay, you were telling him things he did not ask you. Was he at all inquisitive about the terrible things you were seeing and wanting to learn so that he could hold those accountable who were doing it and to be aggressive in an investigation? That is kind of the thing that I want to make sure we are clear on before you leave?

Specialist PROVANCE. Are you asking if he was asking me questions about what I was volunteering?

Mr. SHAYS. No. I do not want to know about what you were volunteering. I mean, that is important, too. What I want to know is you were telling him things that you had seen that he did not seem to know about. Did he want to know more so that he would be better educated about the things that you knew just in the course of your being there?

Specialist PROVANCE. No, sir.

Mr. SHAYS. OK.

Specialist PROVANCE. The only feedback I got was administrative action.

Mr. SHAYS. So he seemed more concerned about what you might tell people, not the information that you had that might help him understand the abuses that went on in Abu Ghraib. Is that correct?

Specialist PROVANCE. Yes, sir.

Mr. WAXMAN. Mr. Chairman, I just want to thank Sergeant Provance for his testimony. It takes a great deal of courage, but that is true of all of the witnesses that are here today, and they speak for themselves, but for others as well. And when they do that, when they are whistleblowers, when they come forward and speak truth to power, we ought to be protecting them, especially when they are being discriminated against and losing their jobs, in effect, their ability to get classified information, which is tantamount to reducing them in their stature and ability to continue in their careers.

Thank you very much for the extra time.

Mr. SHAYS. Thank you.

The Chair at this time would recognize Mr. Duncan.

Mr. DUNCAN. Well, thank you, Mr. Chairman, and thank you for once again calling a hearing on a very, very important topic.

Specialist Provance, you said in your testimony that you saw superiors scapegoating young soldiers and also trying to misdirect attention or direct attention away from what was really going on. I just want to get clear on that. Do you mean that superiors, even after some of these abuses came out, they were still trying to deflect attention away or keep doing what they were doing? Second, what to your mind was the worst example of scapegoating of a young soldier. I am not talking about what you thought were the worst abuses of the prisoners, because we have had a lot of publicity about that, but I am more interested in what in your mind what the worst example that you can think of of a scapegoating of a young soldier specifically.

Specialist PROVANCE. Going to the first part of the question, throughout this whole order, the only people that have been charged or convicted are young soldiers. My own brigade commander testified as being at the scene of a murder saying, "I am not going to go down for this alone," and all he got was an Article 15. An MP stepped on a detainee's fingers, and he spent time in prison. Maybe that even answers both parts of your question, sir.

Mr. DUNCAN. OK. Well, did you see some of these abuses continue even after there had been big worldwide publicity about what was going on?

Specialist PROVANCE. I was already redeployed back to Germany by the time the scandal had come out, sir.

Mr. DUNCAN. Based on what you have heard since that time, do you think it is fair or accurate to say, as many people have, that we treat our prisoners better than probably any other country would?

Specialist PROVANCE. I wouldn't be educated enough to answer that, sir.

Mr. DUNCAN. You wouldn't know that. All right. Thank you very much.

Colonel Shaffer, in another subcommittee of this committee, about a year and a half ago, we heard David Walker, who was then the Inspector General of the Defense Department—he is now the

head of the GAO—he testified that the Pentagon or the military had lost $9 billion over in Iraq, just lost it, couldn't account for it at all, and that another $35 billion had been misspent. That is $44 billion, with a B.

Colonel SHAFFER. Yes, sir.

Mr. DUNCAN. And they came after you and did all this to you for a little $250. Is that correct?

Colonel SHAFFER. That is accurate, sir, yes. And I believe that in the end, when the DOD IG completed the investigation, it will be found that I was due that money all along.

Mr. DUNCAN. Have you known of other people in your 24 years in the military that have turned in similar expense accounts or even inflated expense accounts, and do you think it would be an accurate statement to stay that if they wanted to, they could come after almost anybody in the military, if they really wanted to, for similar type of trumped-up charges?

Colonel SHAFFER. Sir, if I can answer that in general, yes, there have been stories amongst my colleagues of the fact that if they really want to come after you, they are going to find something, something somewhere. And since I had just completed a command of an operating base, which is essentially a Colonel-level responsibility—I had millions of dollars of equipment that I was responsible for—a lot of things can go wrong. I was truly shocked when they came after me for $67 of phone charges, which I would have gladly paid. But the answer is, yes, they will look at vouchers, they will look at activities. One of the big things DIA does is go after people for timecard fraud. They will try to find a way to trick you into putting in the wrong time, and then come after you on that very issue.

Mr. DUNCAN. All right. Thank you.

Mr. German, I had an uncle who many years ago spent a few years as an FBI agent before he became a lawyer and a judge, and he always had tremendous respect for the FBI, as did everybody in our family.

Mr. GERMAN. As do I.

Mr. DUNCAN. But about 3 years ago or so, in this committee we we had a hearing or hearings about the FBI in Boston putting a man who had four small children into prison for more than 30 years for a murder that they knew he did not commit because they did not want to blow the cover of one of their informants. After I heard all that, which I thought was one of the most horrible abuses I had ever heard of, I became convinced that a Federal bureaucracy can justify or rationalize almost anything. The man did finally get out, but it is just horrible to think of.

You say in your testimony that you had your superiors, high-up FBI officials, who backdated and falsified and materially altered your records?

Mr. GERMAN. Those are actually the findings of the Department of Justice Inspector General, so it is not just my opinion. That is what they found.

Mr. DUNCAN. Those are really fancier ways, I guess, of saying that they produced lies.

Mr. GERMAN. They produced false documents and——

Mr. DUNCAN. About you.

Mr. GERMAN. And also materially altered, literally took Wite-Out and altered FBI records to thwart the internal investigation.

Mr. DUNCAN. Is it fair to say that shocked you?

Mr. GERMAN. Absolutely it shocked me. Like I said, in 14 years in the FBI I had never come across anything remotely similar to this. And even the original Title III violation was something that, you know, I thought as soon as I reported would be immediately dealt with. And when the supervisor suggested that we were just going to pretend it did not happen, I was shocked.

Mr. DUNCAN. Has anything been done to any of these people?

Mr. GERMAN. They have been promoted, some of them.

Mr. DUNCAN. They have been promoted?

Mr. GERMAN. Absolutely.

Mr. DUNCAN. Mr. Tice, when you were hired into the National Security Agency, were you give any guidelines or instructions or any encouragement about reporting waste or fraud or abuse?

Mr. TICE. Sir, there is a general policy at NSA that you report waste, fraud, and abuse. As far as connecting it with the Intelligence Community Whistleblower Protection Act or any whistleblower protection, the answer is no.

Mr. DUNCAN. All right. Mr. Levernier, you have a quote from a report in your testimony that says, "At the birth of DOE, the brilliant scientific breakthroughs of the nuclear weapons laboratories came with a troubling record of security administration. Twenty years later, virtually every one of its original problems persists." That was a report issued in June 1999, which is 6½ years ago, closing in on 7 years.

What would you say about that report today? Would you say it is still accurate, or would you say that a great deal of improvement has occurred in that last 6½ to 7 years?

Mr. LEVERNIER. In my opinion, the report is still accurate, and more than just my opinion, the independent review that the Department of Energy's National Nuclear Security Administration commissioned, which was chaired by retired Admiral Mies, U.S. Navy, came out and in its introduction comments referred to the report that you are talking about, the 1999 President's Foreign Intelligence Advisory Board Report, and said that not much had changed from 1999 until May 2005, when the Mies report was issued. So it is not only my opinion that very little changed, but DOE's own internal independent review of the management structure within the security programs in the Department had the same conclusion.

Mr. DUNCAN. Well, I have a large number of people waiting on me in my office right now, and they have been there for a while. But I wanted to hear as much of your testimony as I could, and I simply want to thank each of you for coming forward with your testimony and for being witnesses here today. Thank you very much.

Thank you, Mr. Chairman.

Mr. SHAYS. I thank the gentleman.

Mr. Kucinich.

Mr. KUCINICH. Thank you very much, Mr. Chairman. I would like to ask some questions of Mr. Tice.

Mr. Tice, there has been a lot of attention recently focused on a classified NSA program to eavesdrop on American citizens who call or receive calls from overseas. Many of the people in this room would be familiar with a New York Times story of December 15th that says in the first paragraph, "Months after the September 11th attacks, President Bush secretly authorized the National Security Agency to eavesdrop on Americans and others inside the United States to search for evidence of terrorist activity without the court-approved warrants ordinarily required for domestic spying, according to Government officials." And with unanimous consent, I ask to submit this story for the record.

Mr. SHAYS. Without objection, so ordered.

Mr. KUCINICH. Mr. Tice, are you familiar with that story?

Mr. TICE. I am, sir.

Mr. KUCINICH. A story that ran on January 12th out of mtv.com says, "President Bush has defended his orders allowing the NSA to eavesdrop on e-mails and phone conversations from what he described as a small number of Americans with known ties to al Qaeda without obtaining proper warrants."

Now, everyone agrees that intercepting calls from Osama bin Laden or other al Qaeda terrorists is a national security priority. But outside the Bush administration, there is a great concern that the NSA program violates the Foreign Intelligence Surveillance Act. The President is here saying that this policy of wiretapping without warrants affects a small number of Americans.

Based on your understanding of the program, which now is a matter of public record, would you say that statement by the President of the United States that it only affects a small number of Americans is true?

Mr. TICE. Congressman, I cannot specifically say how NSA does its work or not. I could potentially do that in closed session, but——

Mr. KUCINICH. Did you say that the number of Americans who might be subject to eavesdropping by the NSA could be in the millions?

Mr. TICE. I said if a broad-brush approach was used in that collection, then it very easily could be in the hundreds of thousands, if not millions, yes, sir.

Mr. KUCINICH. You have been mentioned as a source for the New York Times article that revealed the existence of a secret NSA program, but as I understand it, you didn't work on the program. Is that correct?

Mr. TICE. No, sir, I did not work on the program specifically.

Mr. KUCINICH. In your discussions with the New York Times, did you reveal any classified information?

Mr. TICE. No, I did not, sir.

Mr. KUCINICH. What did you provide them with?

Mr. TICE. Technical information that would be possible to gain from any communications specialist in the private sector.

Mr. KUCINICH. Although you were not involved in the NSA program, you stated that you were involved in others. You also stated that you have grave concerns about the legitimacy and the legality of these other NSA programs. Is that correct?

Mr. TICE. That is correct, sir. I was involved in what is called special access programs, which are very closely held, that at some point I would like to talk to Congress about.

Mr. KUCINICH. Are those considered generally "black operations?"

Mr. TICE. We refer to them as "black world operations and programs," sir.

Mr. KUCINICH. Now, we understand that in this particular open setting, Mr. Chairman, we cannot discuss classified information. But can you characterize generally how important you believe it is for Congress to know about this program and your particular concerns?

Mr. TICE. Sir, are you referring to the program that the President has already mentioned or some of the other things that specifically I would like to talk about?

Mr. KUCINICH. Well, we are talking about either one, but let's get into this. You know, the President talked about one type of program that he maintains is a small-scale program. Comments have been made by you that suggest that maybe there is a program going on that affects millions of Americans. So I guess the question is: We know about one program now. Is it possible that there are other programs out there that could conceivably be affecting millions of Americans with respect to warrantless wiretaps?

Mr. TICE. Sir, to go into detail would probably put me underwater here, but I can say that some of the programs that I worked on I believe touched on illegalities and unconstitutional activity.

As far as connecting with the information we know about the program that has been talked about in the press and ultimately confirmed by the President, I can only make a tertiary connection with what ultimately I would like to talk about to Congress.

Mr. KUCINICH. Let me ask you, we know that you have approached Congress about this. You sent a letter to the Intelligence Committee, and you made it clear that you wanted to discuss your concerns in a classified setting. Is that correct?

Mr. TICE. That's correct, sir.

Mr. KUCINICH. But the NSA sent a letter blocking you from talking to the Intelligence Committee. Is that right?

Mr. TICE. They said that the Intelligence Committee were not cleared at the proper security level for what I wanted to tell them.

Mr. KUCINICH. So the NSA said no members or staff on the Intelligence Committee are authorized to hear what you have to say.

Mr. TICE. That's correct, sir.

Mr. KUCINICH. No members or staff, correct?

Mr. TICE. That's correct.

Mr. KUCINICH. Now, Mr. Chairman, from our research and from our discussions with other committees and directly with the NSA, we believe that the program Mr. Tice was involved in is not under the Intelligence Committee's jurisdiction at all. In fact, it appears to be under the jurisdiction of the Armed Services Committee, in which case our committee can also have jurisdiction. In one way, this highlights how difficult it is for national security whistleblower. Mr. Tice is an intelligence official, so he naturally came to the Intelligence Committee. How is he supposed to know the ins and outs of congressional jurisdiction. But as it currently stands

today, nobody in Congress has heard Mr. Tice's information despite his careful and insistent efforts to inform them.

Now, Mr. Chairman, you know, given this maze of bureaucracy, I wonder whether or not you would join with me in writing to both the Intelligence Committee and the Armed Services Committee regarding Mr. Tice's case. If they are not willing or able to hear this information, then I believe that we should do so. I mean, we could even subpoena Mr. Tice to compel him to appear in a classified setting, but before we get to that point, I am just wondering if you would be willing to join with me in writing to the other committees.

Mr. SHAYS. Do I get to write the letter?

Mr. KUCINICH. Of course.

Mr. SHAYS. No, I am teasing. We had talked about this a bit earlier because it is my understanding that there are folks on the Armed Services Committee who have clearance to hear about this program, but not the Intelligence Committee. If that, in fact, is true, that is a shocker to me because I have always believed that the Intelligence Committee trumps all other committees in terms of anything to do with intelligence. If we are finding now that there are things the Intelligence Committee does not know but the Armed Services Committee does, that is a surprise.

In theory, this committee has jurisdiction over intelligence as well, and whenever we ask for anyone, for instance, from the CIA to come to testify before this committee, they get a permission slip from the Intelligence Committee saying they do not have to attend. So I am eager to pursue this issue with you, Mr. Kucinich, and we will pursue it.

Mr. KUCINICH. I just have a few more points. Thank you, Mr. Chairman.

It was very shocking to many Americans to know that their Government was conducting warrantless wiretaps. It is even more shocking to see assertions that eavesdropping by the NSA could be "in the millions if the full range of secret NSA programs is used." That from an ABC News article by Brian Ross of January 10, 2006, regarding discussions with yourselves.

Is it your belief that it is an urgent matter relating to the protection of the Constitution of the United States that Congress obtain information to determine the full scope of the eavesdropping going on in this country?

Mr. TICE. Yes, sir. As a matter of fact I have NSA's policy in front of me that basically NSA tells its own people, you will not do this, ultimately, "the policy of the USSS, the U.S. Signals Intelligence Service, is to target or collect only foreign communications."

Mr. KUCINICH. Do you believe our Constitution is at risk because of widespread wiretapping?

Mr. TICE. Ultimately, domestically, I have the fourth amendment in front of me. The answer is yes, sir.

Mr. KUCINICH. You have the fourth amendment in front of you?

Mr. TICE. Yes, I do, sir.

Mr. KUCINICH. Do you want to read it?

Mr. TICE. Sure. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particu-

larly describing the place to be searched, and the persons or things to be seized."

Mr. KUCINICH. Do you believe in that fourth amendment?

Mr. TICE. Yes, sir. As a matter of fact, as an intelligence officer, we are required to raise our hand and swear an oath to protect and support the U.S. Constitution.

Mr. KUCINICH. You have taken an oath to support the Constitution of the United States, and am I correct that it is in that spirit consistent with the oath that you have taken that you have approached Congress and asked for an opportunity to meet with Members of Congress in a classified session so that you can discuss with them your belief that the Constitution itself is being put at risk with regard to domestic eavesdropping and the scope of it?

Mr. TICE. Partially, sir. Most of what I want to talk to Congress about is not directly related to what you know about right now.

Mr. KUCINICH. Well, obviously it is not because it would be in a closed session.

Mr. Chairman, I would like to submit for the record a number of articles that relate to this case, and I think that it is important that Mr. Tice has come forward.

One final question. Has the Justice Department contacted you in connection with its investigation of the so-called leak of information that has resulted in a hunt for those who are responsible for informing the New York Times of this previously clandestine domestic eavesdropping matter?

Mr. TICE. About 2½ weeks ago, I was approached by the FBI. They came to my home, and they said they wanted to talk to me. Knowing the witch hunt that is going on right now at NSA, I told them that I preferred not to talk to them.

Mr. KUCINICH. Mr. Chairman, I think that this is a matter that this subcommittee should reserve the right to continue to review, because not only did the American people not know about the eavesdropping going on, but instead of trying to get into the nature of the eavesdropping, the Government is going after people who basically were defending the Constitution. This world does not have to be upside down, as long as we stand by our obligation to support people like Mr. Tice.

Thank you, Mr. Chairman. Thank you, Mr. Tice, and other members of the panel.

Mr. SHAYS. I thank the gentleman, and I thank you, Mr. Tice, for your responses.

Mr. Dent, you have the floor.

Mr. DENT. Thank you, Mr. Chairman.

My question is to all of you, and we will start, I guess, from the left with Specialist Provance. Were any of you advised of various whistleblower rights upon the commencement of your employment? We will start with you, Specialist.

Specialist PROVANCE. The only thing I have been told regarding me and my testimony is that I was going to be punished for the testimony offered and then actually being punished itself.

Mr. DENT. So the answer is no, you were never advised of whistleblower rights upon your enlistment or duties in the military.

Specialist PROVANCE. That is correct.

Mr. DENT. Thank you.

Colonel.

Colonel SHAFFER. Sir, I stumbled into being a whistleblower. I really had no intent to make disclosures which I thought were of that nature. I was trying to report what I thought were legitimate issues regarding failures.

I was first notified of the fact that there are no provisions to cover disclosure of particular information by the executive director of the House Armed Services Committee when we were discussing this back before I went public in office, and he basically said, "We will do what we can to help protect you, but you are on your own." That was my first, I guess, realization there was nothing there for whistleblowers.

Mr. DENT. Thank you, Colonel.

Mr. German.

Mr. GERMAN. No, never.

Mr. TICE. Actually, no, sir, although I thought that there was a whistleblower protection law out there that I generally knew about that ultimately I found out did not apply to the intelligence community, nor have I ever in any of my intelligence services been informed that there existed an Intelligence Community Whistleblower Protection Act. It wasn't until I talked to the DOD IG that he informed me that such an animal existed.

Mr. DENT. Thank you.

Mr. LEVERNIER. The answer is no.

Mr. DENT. My second question is: What improvements would each of you recommend to protect national security whistleblowers, particularly as it relates to security clearances? I thought maybe we would start with Colonel Shaffer on that point.

Colonel SHAFFER. Well, sir, I think one of the biggest things is transparency of process. There is a due process system involved for the clearance process. It is called the "whole-person concept." Any adjudicator needs to look at every aspect, good and bad. There's easy ways to bypass that. In my particular instance, the investigations literally excluded all exculpatory information. My attorney Mark Zaid and I reviewed the files. There was not a thing in there about my awards, my accolades, or anything else, and it was literally easy for them to stack the deck because there would be no scrutiny of their process. So I think that would be one of the biggest things, is actually putting into the process a way of reviewing the oversight of how clearances are granted and possibly even doing a "must issue" clearance, much like, if I could digress to the Second Amendment here for a second, in Virginia, for conceal carry it is a "must issue" policy. If you can't find anything bad about the person, you have to issue the permit to carry concealed. I think it should be a similar consideration for clearances.

Mr. DENT. Thank you.

Mr. German.

Mr. GERMAN. One of the things I think would be very helpful is having some sort of advocate for the whistleblower, because what happened to me was that it immediately became—all the questions were what are his motivations for reporting this. And they never would tell me what they thought my motivation was, but the focus became on me as opposed to what the material I reported was. To make it clear, in this terrorism investigation I did no investigation.

It was literally FBI Tampa's records conflicting with FBI Tampa's records. The same people were writing two completely opposite things, what happened before my complaint, and then what happened afterwards.

So I really had nothing to do with it except to point it out. But because they didn't want to react to my complaint, everything became focused on me, and I had nowhere to go. You asked about whether I had been advised of my rights? I was literally in a position of doing my own research on what the whistleblowers rules were and reporting them to the Office of Professional Responsibility and to the inspectors and to the DOJ Inspector General to where they didn't even under—I would have to point out portions of the statute to them that you are supposed to do this, and, you know, so I think if there was somebody who was an advocate—because part of the problem is because you keep complaining when nobody else wants to hear it, you become the problem, as opposed to if I had an advocate who I could report it to and go on with my job. I never wanted to be a whistleblower, like Tony said. I wanted to be an FBI agent, and I wanted to do my job. The only reason I am here is because they prevented me from doing my job. And if there was somebody who would take the issue and run with it, then I could go back to doing my job and not be involved anymore.

Mr. DENT. Thank you.

Mr. TICE. Yes, sir, one thing I thought was interesting about my particular case was it seemed that the Security Office at NSA was running the entire situation, no matter where I went, whether it was to the medical board or whether I was putting in a FISA request for my own records, to this day which I have never received my own records from NSA through my FISA request. They were supposed to let me see my own records, but they, of course, denied me that ability. Everything seemed to be run by security. At NSA, even if you work in the General Counsel's Office or if you work at the IG, their clearances are controlled by the Security Office. So ultimately you have a situation where in a Hoover-esque style, the Security Office can literally run roughshod over everyone else in the agency. Also, they keep a data base, I call it the "dirt data base," on everything that you have ever done in your life garnered from background investigations and polygraphs. I believe that information could easily be used to blackmail anyone who works at NSA into making sure that the will of the Security Office is ultimately followed. And, ultimately, you have to take that blackmail away, that capability away from the Security Office, and make it totally independent. And, ultimately, if someone is basically investigating themselves, which is what the DOD IG allowed NSA to do in my case, you are not going to get an unbiased opinion.

Mr. LEVERNIER. Could you repeat that question?

Mr. DENT. Yes. The question was: What improvements would you recommend to protect national security whistleblowers, particularly as it relates to security clearances?

Mr. LEVERNIER. Well, I would echo the comments of the Lieutenant Colonel. The Department of Energy has a similar rule. They don't call it the "whole-person rule," but they say that you are supposed to evaluate all of the information about a person, favorable and unfavorable, and that is codified in the Code of Federal Regu-

lations. And what happened in my case and what happens in many cases, the personnel security decisions are judgmental. It is someone's judgment about how important a specific characteristic of a person is. And in one context, they will say that someone that stole 13 pens when they were 13 years old is evidence of dishonesty and, therefore, should be prevented from getting a security clearance. But in another case, it is overlooked, and there is no precedent, there is no consistent, uniform application of the standards and criteria.

I am not advocating that we have to come up with some sort of a criterion on how you evaluate every issue, but there needs to be more standardization, and probably the best way to achieve that would be some independent review that you could go to if you felt that you had been singled out for retaliatory purposes. At least in the Department of Energy, there is no independent review of actions that are taken. You are stuck with their decision, end of story.

Mr. DENT. Thank you.

Specialist Provance.

Specialist PROVANCE. Well, I do know, sir, that under the current Whistleblowers Act it does not cover those of us who have spoken to the media. It only refers to our—such as our chain of command or the Congress itself, which is, in my own situation, you may find it a little bit too intimidating or actually, you know, you will get punished along the way by doing that. And I would just recommend that more leeway be given to those of us that have spoken to the media under this Whistleblowers Protection Act.

Mr. DENT. Thank you. I have no further questions, Mr. Chairman.

Mr. SHAYS. I thank the gentleman.

At this time, Mr. Van Hollen, you have the floor.

Mr. VAN HOLLEN. Thank you, Mr. Chairman. I want to thank all the witnesses for testifying. Thank you for your courage in being here. And I do think people listening to these proceedings would be very alarmed at two things: No. 1, they would be alarmed at the kind of abuses that are going on in various agencies, but they are going to be just as alarmed about the lengths to which people in those agencies went to block you from testifying and to retaliate against you, using, of course, taxpayer resources, not just to block the public from knowing what is going on, but then to really go after each of you to try and discredit you. So I am very thankful and grateful that you are all here today.

Mr. Tice, if I could just ask you, you talked about that the procedure you went through at NSA to report your complaint, you first went to the IG at DOD. Is that right? What was the——

Mr. TICE. Well, the first thing I did is I just happened to know the Deputy Director of NSA personally, and 2 days after they took my access to classified information, I just happened to be at an event where he was there, and I asked to talk to him, off-line—in other words, in private. And I told him what had happened, and his advice to me was to get a private opinion about my being declared paranoid and psychotic, and "that would take the wind out of their sails." So ultimately I did get the second opinion from a private sector psychologist.

Mr. VAN HOLLEN. But within the Government framework, you went to the Defense Department IG, and as I understand, they essentially sent you right back to NSA.

Mr. TICE. Yes, sir. Ultimately, when I did not hear anything, and I waited about 3 months, and I got no response from the Deputy Director. I talked to my supervisor and he said he took it up the line, and Security told him to mind their own business. Then I went to Senator Mikulski, and she helped me a little bit as far as getting to the IG. Ultimately I went to the IG, and the IG allowed NSA's IG to do an investigation.

Mr. VAN HOLLEN. I ask you that because I have a couple questions about the process someone would go through with respect to the domestic warrantless wiretapping program, because under FISA, as we all know, an individual who violates the FISA law can be held criminally liable under that statute, regardless of what the President's interpretation of the law may be, and I think most lawyers and scholars who have looked at it think that the President's interpretation and legal justification—not security justification but legal justification—has been flimsy. And despite that justification, ultimately a court of law may decide whether or not an individual at NSA can be held individually liable for violating FISA.

So if you are an individual at NSA and you are part of the domestic wiretapping program, and you look at the FISA law and you read Section 1809(a) and say, Hmm, I may be criminally liable under this FISA statute, I have some questions about it, you would turn to who first under the current procedures to say, look, I am not sure what is going on here, I am not sure if this is really legal, who would you turn to first?

Mr. TICE. Ultimately, I think you are supposed to turn to the NSA IG if you are an NSA employee.

Mr. VAN HOLLEN. And as I understand the process, as you go through different steps, ultimately if you were to report this case within NSA, you would ultimately end up back, as you did, where you started, at NSA. Is that right?

Mr. TICE. Yes, sir.

Mr. VAN HOLLEN. In other words, the very people who have made the determination, a legal determination, that this is OK would be making a decision about whether or not your individual conduct was appropriate or not. Is that right?

Mr. TICE. Well, supposedly, the General Counsel at NSA reviewed the decision to spy on Americans. But, ironically, when I read the policy of NSA, this policy is drilled into our head as signals intelligence officers. Every signals intelligence officer knows you do not do this unless there's some extraordinary things that happened, or it could be done inadvertently, and then there's ways, you know, to address it from there. But it's drilled into our heads, you know not to do this, and, you know, the scuttlebutt that I heard was when—during the last Presidential election was that there were a lot of folks that thought if Senator Kerry was elected President, that they would ultimately face some legal ramifications. Apparently, there was a lot of people wiping their brow when our current President was re-elected.

Mr. VAN HOLLEN. Well, I think what all of your testimony reveals is that when you are talking about national security issues

and issues involving intelligence, the fact of the matter is at the end of the day there is really no independent evaluator outside of your own particular agency who can make some authoritative decision and override the decision of the agency. And so in the case of the NSA wiretapping, people are sort of at the mercy of a legal interpretation within NSA, however flimsy that may turn out to be. And I can tell you, I think the reason you are seeing some bipartisan grumbling, especially on the Senate side, and hopefully self-respecting Members of this body, in the House on both sides of the aisle, will begin to take a closer look at this.

Unfortunately, Mr. Chairman, the Judiciary Committee in the House has refused to have a hearing on this issue to get to the bottom of some of these issues.

But let me just turn to Mr. German, if I could, because I think the title of this hearing is very apt, the labyrinth. I mean, you really just got caught up in a byzantine process. And as I understand your testimony, you went through the immediate chain of command, and then you finally said, "I am going to the IG at the Justice Department." And you got to the Justice Department IG, told your story, and there was no followup. And it is only when they understood you may be going outside the Justice Department itself that you began to get someone to pay attention. Is that right?

Mr. GERMAN. Right. I reported it initially through my chain of command. It was then reported to OPR. OPR refused to open an investigation. And I contacted the IG, who at least said they would interview me. Then OPR wanted to be in the interview, so OPR and IG interviewed me together. Then the Inspection Division came in and took it away from OPR, and then about a year later, the IG told me they would not pursue an investigation. Only when I demanded it in writing did they then say, well, wait a minute, and then open an investigation. And that was in January 2004, so that was 2 years after the events in question that they decided that they would open an investigation. Nobody contacted me by March, so I called them and they said, oh, we haven't assigned it yet. In April, they just reinterviewed me for the third time and said, "We are going to re-evaluate your interview and decide whether to proceed." And that is when I reported to Congress, and I knew that at that point I was——

Mr. VAN HOLLEN. That is when you began to get some attention within the Justice Department.

Mr. GERMAN. Right, but I also knew that was time to go.

Mr. VAN HOLLEN. Time to go. I understand.

In your testimony, you make it clear that this saga is continuing. Could you just talk to the subcommittee a little bit about the predicament you are in right now?

Mr. GERMAN. Well, my understanding now is that the Inspector General's report now is sent to the Department of Justice Office of Attorney Recruitment and Management, but only 13 pages of the 52-page report are actually submitted. And in order for me to get the witnesses and the documents, I actually have to request depositions and discovery. But now the burden is completely on me, and the fact finder, the independent fact finder, is now my adversary in this proceeding.

Mr. VAN HOLLEN. So they have turned the tables on you, and what is——

Mr. GERMAN. Right, and put me back at square one.

Mr. VAN HOLLEN. What is the nature of the proceeding against you?

Mr. GERMAN. My understanding, from what they have been able to tell me, which is very difficult—they have been very professional with me, but it is just hard to understand how this is supposed to proceed, because I don't have access to any records. I left the FBI. So I don't have a security clearance anymore, and they say that it is a de novo procedure, somewhat like an administrative law court, where I have to go in and argue without access to the documents, and if I ask for documents, there is no guarantee that I will get the documents. I have to ask for depositions to be taken. This is, you know, all on my nickel.

Mr. VAN HOLLEN. So while they are continuing to essentially come after you, let me ask you what has happened to the people where they found actual wrongdoing? Because as part of the IG's report, which they finally opened up after all your efforts, they did find that people had falsified documents as part of the investigation you were participating in. Is that right?

Mr. GERMAN. Right. They found that the documents were backdated and were actually falsified with Wite-Out. And as far as I know, all the people involved were receiving regular promotions by the time I left.

Mr. VAN HOLLEN. I was going to ask you, so to your knowledge, none of them have been held accountable. Is that right? In the sense that none of them have received any kind of punishment or sanction for what was admitted wrongdoing.

Mr. GERMAN. Right.

Mr. VAN HOLLEN. And with respect to the unauthorized wiretapping and the people involved with that originally denied they did this. Is that right?

Mr. GERMAN. Right. They denied the meeting was recorded and took the evidence of that, the tape, and how I—you know, I found out about it when I saw the official record where they were denying that it was recorded. I had a transcript of the recording, so that was pretty good evidence that it had been recorded. And I provided the transcript to the Inspector General and to the FBI's OPR.

The unit chief of the Office of Professional Responsibility came in shortly after I provided it in the OPR office and said, "I have good news. They found the tape. It's in the supervisor's desk." Well, I knew at that point that this game would——

Mr. VAN HOLLEN. Has any action been taken against that supervisor that you know of?

Mr. GERMAN. My understanding is there have been regular promotions.

Mr. VAN HOLLEN. Right. Now, as an FBI agent, you understood that an unauthorized or illegal wiretapping, if you had been directly involved with that, that could have meant you could have been held liable for that. Is that right?

Mr. GERMAN. Right. It is a violation of Federal law for an agent to illegally record that conversation.

Mr. VAN HOLLEN. Exactly. And under FISA, just to go back to the point with respect to NSA, under FISA, if you violate FISA, the individual can be held legally liable, and you understood that.

Now, another implication of that, of course, is that if you proceed in your case and you take it to court and the defense says, well, this evidence that you are using is the result of an illegal wiretap, you can't use that evidence in court. Is that right?

Mr. GERMAN. That's correct.

Mr. VAN HOLLEN. So it could totally destroy your entire case.

Mr. GERMAN. Which was my concern in August 2002, that if we didn't deal with this problem immediately, there was no point in proceeding because the prosecution was cripped.

Mr. VAN HOLLEN. The individuals could run free at the end of the day because of a bungled investigation. Is that right?

Mr. GERMAN. Right.

Mr. VAN HOLLEN. Well, just to close the point, going back to the NSA issue, one of my concerns with respect to the NSA wiretapping is, again, regardless of what the President's interpretation of the law may be, any individuals out there that we may have obtained evidence against them through the warrantless wiretapping instead of having just gone to the FISA Court and gotten a warrant through the regular process, now if we decide to bring any kind of criminal case against them, they may well at the end of the day go free because the decision was made not to go through the lawful process, not to go through the FISA Court, which has approved thousands of these, more or less. My understanding is they have only rejected a handful. And it seems to me to jeopardize cases that are important to our national security by not following the law appropriately is at the end of the day really going to hurt our security.

If we need to change the law, if the FISA process does not adequately protect our ability to gather this information, the obvious approach is for the President to come to the Congress as part of PATRIOT Act discussions or whatever and ask for a change in the law. And I can tell you, I think the Congress would be very willing to work with the President if he would tell us exactly what it is that is inadequate in the law. But under the current procedures, as you point out in your case, if you do not go through the procedures, at the end of the day not only could you be liable, but the whole case could get thrown out.

Thank you, Mr. Chairman.

Mr. SHAYS. I thank the gentleman.

Mr. Ruppersberger.

Mr. RUPPERSBERGER. Well, there are a lot of issues here today, and I again want to thank you all for coming. And obviously we have a problem with the whistleblower protection statute, and hopefully we will, after today's hearing, be able, as the investigative arm of Congress, to try to develop some procedure or law to really make a better program to allow people who have a concern about issues that they are dealing with, and each one of you have your story.

I happen to be on the Intelligence Committee, and I represent NSA. Mr. Tice, I am not sure whether you are my constituent, but a lot of people who work at NSA are actually my constituents also.

And my concern about where we are going right now is that—Mr. Tice, I am going to use you as an example. You have concerns. You said today that you felt that some of your concerns might violate our Constitution. And yet you are having a hard time getting your facts out on the table, so Congress, the independent body of the administration, should be the check and balance to hear your story.

Now, I am not sure what your story is because I have not talked to you, and I do not have the facts, and we need to get those facts in a classified way. By the way, I want to acknowledge you, Mr. Tice. I have a copy of a letter sent to you January 9, 2006, and it is from Renee Seymour, Director, NSA, Special Access Program, Central Office. "I want to congratulate you in the exercise of your rights. You are acting responsibly to protect sensitive intelligence information." And when you do go to work for the NSA, CIA, certain intelligence agencies, you have to sign a document saying that you will maintain the confidentiality of this information that you are working with, which I feel you need to do because we need to protect national security. And we cannot let the bad guys know what we are doing. We must have that for our national security.

But what happens in your scenario? And that is what we have to resolve today, and that is where my question is going to go. I am going to directly probably talk to you, Mr. Tice.

The first thing, it is my understanding that you did follow the proper protocol. You went to the Inspector General of the NSA. Is that correct?

Mr. TICE. That is correct, sir.

Mr. RUPPERSBERGER. OK. Now, when you went to the IG, you gave your story, you stated your position.

Mr. TICE. I did not tell them about the SAP programs that ultimately I want to talk about.

Mr. RUPPERSBERGER. Is that because you were not allowed to, or they did not have the clearance, or what? What I am trying to do is determine what, as far as an individual such as yourself that is working in a classified area, what do we need to do to allow you to feel comfortable when you feel there is abuse, to get your information to Congress, who is the check and balance between the administration, pursuant to our Constitution?

Mr. TICE. At that time I brought up a couple issues that I thought I might want to go to the ICWPA about.

Mr. RUPPERSBERGER. Why don't you explain? I know these acronyms, and we have a lot of acronyms in intelligence. Why don't you explain that?

Mr. TICE. The Intelligence Community Whistleblower Protection Act, which——

Mr. RUPPERSBERGER. All right. I believe 1998.

Mr. TICE. I will take your word for it, sir.

Mr. RUPPERSBERGER. I have it written down here. It is 1998.

Mr. TICE. That was the intent. At that time I did not bring up the concerns, first of all, because I knew those people would not be cleared; second of all, because the information is so closely held that I potentially could, I figured out the programs. And these programs actually are very beneficial to our citizens as far as their security. So I did not want to say anything at that time.

Something has happened since then that in a classified setting I would be more than willing to tell you, but it is sort of a barrier that has been lifted from me where ultimately I feel I can tell you now.

Mr. RUPPERSBERGER. Well, let's get to the process. The first thing, the Inspector General did not have the clearance to hear what you had to say to them.

Mr. TICE. That's correct.

Mr. RUPPERSBERGER. So, in your opinion, do you feel that we need to deal with that issue first, that the person who has information that feels is contrary to what the administration is doing or the policy of the administration, when you go through your process pursuant to the Whistleblower Act of 1998, you are going to somebody that you really can't tell the story to?

Mr. TICE. That's correct, sir, and ultimately the issue of confidentiality, because once you got to the DOD IG, you are pretty much putting your career on the line.

Mr. RUPPERSBERGER. Tell people what the DOD IG is, Department of Defense Inspector General.

Mr. TICE. Department of Defense Inspector General.

Mr. RUPPERSBERGER. OK. Try not to talk in acronyms, if you can. OK. So then from my point of view—and, Mr. Chairman, I think this is a relevant issue. When we have the Inspector General—and I want to focus on the intelligence area. We have an Inspector General that really is there in a process pursuant to this law, but that Inspector General cannot receive the information because it is classified. So we have to work through that. Do you agree?

Mr. TICE. Yes, sir. As a matter of fact, I suggested to the Department of Defense Inspector General that they gain the proper clearances in the Special Access Programs that I was involved with.

Mr. RUPPERSBERGER. OK. Now, after you went to the Inspector General, who cannot hear what you have to say, then what happened?

Mr. TICE. From that point, the Department of Defense Inspector General sent my case down to the National Security Agency's Inspector General to investigate it. But we are talking about the case of ultimately my being fired and the false, you know——

Mr. RUPPERSBERGER. When did that occur? When did you get into that realm? When you said you had information you wanted to give, you went to the Inspector General, but not the Inspector General of NSA, just the Inspector General of the DOD.

Mr. TICE. That's correct, sir, and the timeframe would have been, I do believe, in the spring and summer of 2004.

Mr. RUPPERSBERGER. OK. Well, when did you feel that you all of a sudden went from a status of an employee who had a problem with a program that you wanted to raise the issue about to the fact that you were now maybe in trouble because you wanted to say something? When did that occur? And what event triggered that?

Mr. TICE. The initial retaliation was because of a suspicion of a coworker involved in espionage, and we are sort of talking apples and oranges. If you are referring to, you know, my wanting to talk to you about some possible illegalities in a SAP program, that didn't come until much later.

Mr. RUPPERSBERGER. OK. Now, when you went to the Inspector General of NSA, was that person able to receive the information that you had?

Mr. TICE. No, sir, they were not cleared.

Mr. RUPPERSBERGER. Because they were not cleared also. So, again, you have somebody in the system that the system is not working because that person cannot hear your information. Then what occurred after that?

Mr. TICE. After I went the Department of Defense——

Mr. RUPPERSBERGER. After the NSA Inspector General.

Mr. TICE. In relation to the retaliation for the espionage suspicion?

Mr. RUPPERSBERGER. Yes.

Mr. TICE. After that, I was just put in limbo and waited.

Mr. RUPPERSBERGER. And that is where you are now?

Mr. TICE. Well, I am fired now, or they say "removed." They revoked my security clearance because of my supposed mental state.

Mr. RUPPERSBERGER. Are you still unemployed? Are you getting paid?

Mr. TICE. No, sir.

Mr. RUPPERSBERGER. OK. What is your status then?

Mr. TICE. I am unemployed, former intelligence analyst.

Mr. RUPPERSBERGER. OK. Now, let's get to the NSA, and it has been raised here before about the issue of the NSA and the program that has gotten a lot of publicity.

To begin with, when you look at the history of our country, we left the King of England, and we wanted to create strong States rights. Realizing that we could not deal internationally that way, our forefathers created a Constitution, and one of the most important aspects of that Constitution is checks and balances. And when, in fact, the administration does not understand or does not want to follow the checks and balances, it seems to me that we have problems.

My concern with your issue or anyone that works in NSA or anybody at this table, you need to know what the law and the rules are. You should not have to worry about interpreting anything. If you have an issue and you are a citizen of this country and you work in a classified area or it is very important and you think something is wrong, you should have the ability, without the threat of reprisals, to be able to have a system to go to somebody in authority who looks at that system. And it seems to me that is broken. Does everyone here feel that way?

Now, getting back to the issue of intelligence, the first thing, I have heard you. You have gotten some pretty tough questions from some of the members on this panel, and as a member of the Intelligence Committee, I think you have handled yourself well here today. But when you are talking about a system, you also have to have a system that is going to work on all sides because—let me give you an example. We have 21 members on the House Select Intelligence Committee. It is very important that if we had a complaint from every employee in the Department of Defense and NSA and CIA, we would be hearing complaints all day. So we need to have a system that makes sure that the administration of those agencies is able to vet and able to make sure that if something is

going to come before us, that it has been vetted, meaning looked at, reviewed, whatever, or we would be sitting there hearing complaints all day. And I am not sure if NSA—and I want your opinion—feels that what you have is not relevant or why it should not come before us, or do you feel that there is some other motive to that in that regard?

Mr. TICE. I think that the information I want to bring forward, they feel that if it comes out would be possibly as explosive as what you already know, and ultimately they don't want anyone to know that.

Mr. RUPPERSBERGER. But there are two concerns here. We can talk about what we need to do here with whistleblowers, and we need to make sure that we follow our Constitution. We swear an oath to do that. But we also have to make sure that we protect our national security, that we protect ourselves from terrorist attacks. And it is very important that classified information not get out, but that we have a system from within to make sure that people like me—that is my job on the Intelligence Committee. And I am concerned about the whole NSA issue because I still don't know—whatever the administration did—whether they were justified in doing it because we haven't been able to hear the facts yet. We have heard a little, but not much, not what we should.

So how can you make a determination on any issue whatsoever, whether it is your issue or the NSA issue that is out there, unless we hear the facts? And our Intelligence Committee, both in the Senate and the House, were set up, because it is classified hearings, to find out what that issue is. And right now that is not working. And this issue is not going to go away. I would hope the administration would come forward, give us the facts, and let us make the determination because, believe me, I don't know anybody on our committee, whether they are right wing, left wing, Republican or Democrat, that is not willing to give the tools to our intelligence agencies to protect our country from another terrorist attack. But it has to be done pursuant to the law.

Now, let's get back to your situation. We have had a lot of testimony. Is anyone on the panel—but I want to focus into the intelligence arena. When you have information that really cannot get out because—to protect national security, but yet you feel that it is a violation of our Constitution, how would you want to see this structured? I have gotten out of you here today that the Inspector General issue is a major issue, that is not getting anywhere. And it seems to me that we need to get somebody who is fully cleared to be able to hear information like this and then take that information and evaluate it and vet it and make sure that the person is not a disgruntled employee, someone who is bitter or mad or whatever, but an American who says, "I do not believe this is right, and I should have the ability to go to my superiors and lay this out on the table and let it be analyzed." And if it is that serious, to get to the Congress, who are the check and balance between the administration and your department.

Mr. TICE. As far as a suggestion, sir, if we had some sort of panel of, say, former, retired intelligence professionals that had nothing to do ultimately with their paychecks or in an augmented fashion coming from the agencies that they formerly worked with and

cleared them even up to the Special Access Program level where independently they could look at something like this and deal with it in a very small group, and drawing from their own experiences as former intelligence analysts or officers or agents or whatever, then I think that independence would sort of——

Mr. RUPPERSBERGER. And are you saying they should be in the Inspector General role or after, like appealing from the Inspector General to that group?

Mr. TICE. I would think they would be totally devoid of any connection with the Inspector General.

Mr. RUPPERSBERGER. OK. Anybody else have any suggestions?

Colonel SHAFFER. Sir, respectfully, I think that there may be some merit to assigning the overall Inspector General function to the Congress and consolidating all Inspector Generals under that oversight, and then allowing for mechanisms to be created where you can make protected disclosures and let it be sorted through.

Part of the process I think all of us have gone through is there was no objective reflection on what we were saying, plus the bureaucrats who were hearing it had their own motives to protect their own equities, that is to say that there is no benefit to them directly by supporting what we were saying. As a matter of fact, it was to the contrary because it showed wrongdoing on their part, they did not want to hear it. So it is very important——

Mr. RUPPERSBERGER. That is a very interesting point. And there also is a lot of protection of turf, whoever it is.

Colonel SHAFFER. Yes, sir.

Mr. GERMAN. I would like to reinforce that, because one of the problems with just writing a new law is, you know, as my case demonstrates, the FBI is not following the law. There is a law against an FBI manager taking out a can of Wite-Out and covering up FBI documents, you know. But why was this person so comfortable in doing that in such a crude way? It was because he knew nobody would look. There was nobody looking over his shoulder. So if there was someone outside the agency like the Congress, I think it requires oversight.

Mr. RUPPERSBERGER. I hate to say this—and this is part of what we have to do in Congress, but my time is up. Mr. Tice, I hope that we can resolve somehow your issue, and also it is important, I think, to make sure that they look at you and all of you here. I hear your story, Mr. German. From what I hear, I do not like what I hear, but I do not have enough time to get into it. But I would hope, Mr. Tice, that your issue is not completed, and I am going to do what I can to see where it is.

Now, I do not know you. I do not know your background. I do not know what you have to tell me because you cannot tell me right now. But it is a case study that we need to look at to protect other employees and other intelligence agencies who feel there is a violation of the Constitution who are patriotic Americans, but they feel that at least their issues should be heard without feeling there is a reprisal, and you want to feel secure to come forward. It is like—it has been said yes-men are dangerous sometimes, and you need to get all the facts out on the table.

Thank you.

Mr. SHAYS. I thank the gentleman.

I will close up with my time now from Mr. Weldon. This subcommittee has looked at three areas. We looked at the issue of overclassification and sitting at that desk, we had a DOD representative who said that in her judgment, over 50 percent of what we classify should not be classified, it should be available. And so that is one issue we look at, and it relates to, I think, really what all of you are wrestling with. Sometimes we seek classification simply to prevent someone from being embarrassed.

And then we have this concept of sensitive but unclassified, which technically is not classified, but it is sensitive and cannot be shared with anyone. Or another term, "For Official Use Only," which is not classified, but, you know, what does that mean?

So, I mean, we need as a country to wrestle with this big time. And I suspect that some information would be available to the public that would be helpful for the public to know and not in any way endanger our country and, in fact, help others who work in other parts of the Government know information that they could not see because it was classified. But had it not been classified, it would have helped them do their job better.

Another issue is that we are looking at the Civil Liberties Board that really is not working properly, is not funded, and seeing if we can take the 9/11 Commission recommendation, which is to have a Civil Liberties Board that would be Presidentially appointed, Senate-approved, subpoena power, and an individual in each of the agencies that would see when things are not going well. And I would think we would maybe tie that to the whistleblower.

And the third thing is we are looking at the Whistleblower Protection. It does not work as well as we want throughout the Government, and it works pathetically, in my judgment, all of your testimony has been very helpful. But the Whistleblower Protection is not working, in our judgment, in the intelligence side.

What I want to do, though, is my first inclination is to be asking all the sympathetic questions that will allow you to talk about how you have not been treated well, but I just need for the record—and I hope you understand. What I am wrestling with is we cannot allow everyone, anytime they think something should be public that they think is wrong, to go public. There would be chaos. We would endanger individuals in our Government. Forget embarrass people. I could care less about that. We would endanger them. And we would put our Nation at risk.

So there has to be a process that does not allow you, Mr. Tice, to come in and say whatever the hell you want here. I think you know that. You obviously got our attention when you said publicly there are things that you want to share that you think are wrong that is going on in the Government. And we need to followup on that, and you need to speak out about it.

But just take the whole issue of the NSA and wiretaps. There were eight Members of Congress who were told, and not one of the eight Members of Congress—said this is wrong, illegal, and it has to stop. There was one Member who voiced reservation, and there was another Member who had concerns about other things that were happening that the administration was doing and tried to tie that into a reservation about the NSA, and it was not connected. And so Congress has truly failed as well.

So what I want you each to do is first off, Specialist Provance, I am deeply touched by your testimony because I feel you had to confront the most powerful, and you shared information with a superior officer who did not want to know what you wanted to tell him. He wanted to know what you were going to tell others.

What is available to you to share information with a superior when you see illegal acts? What do you think is available to you? Are you supposed to go to the next person in line, or can you jump up to a General?

Specialist PROVANCE. You are supposed to go through your chain of command, which begins at your company, and you are told if it is not handled, you go to the next available commander, which would be battalion, and if he——

Mr. SHAYS. OK.

Specialist PROVANCE. It goes up the chain of command, and then once you have exhausted the chain of command, you are to go to the Inspector General, and that is pretty much where it is supposed to end, sir.

Mr. SHAYS. And how do you make contact with the Inspector General?

Specialist PROVANCE. It would depend on where you are at, sir, but generally it is a matter of either visiting their office or calling them on the telephone.

Mr. SHAYS. But if you are in Abu Ghraib, there is no Inspector General walking around.

Specialist PROVANCE. No, sir.

Mr. SHAYS. See, I have been to Iraq 11 times, and I have had pushback from the Department of Defense at least 5 of those 11 times. And my view is if one Member of Congress had showed up at Abu Ghraib—how many Members of Congress did you see show up at Abu Ghraib?

Specialist PROVANCE. I didn't see any, sir.

Mr. SHAYS. Yes. Zero, right? If you had, probably what would happen is a Member of Congress would have come by, you would have said, "I don't know the first damn thing about guarding"—I am not saying you, but someone there—"guarding prisoners. I am a cook." And then they would have probably said, "Terrible things are happening. You need to check it out." And we could have nipped it in the bud, found out what was happening, and we didn't do our job. And that was Congress simply not out there and available.

But there really is no Inspector General when you are in Abu Ghraib, correct?

Specialist PROVANCE. That's right, sir.

Mr. SHAYS. Lieutenant Colonel, what is the process? Any change in what——

Colonel SHAFFER. No, I think the obvious answer is always approach your chain of command, and then I think if you don't get satisfaction, you have to find another outlet.

I will just use my story as an example. Iraq, September 11th, the attacks—as a matter of fact, sir, you were part of the solution, as I understood it, because you and others were made aware of some of the work we had done on Able Danger. You and Congressman Weldon, I believe Congressman Dan Burton, all were involved in

reviewing it. I figured when I was told that, my work is done, I have nothing to say.

It wasn't until I come to find later, after I disclosed my information to the 9/11 Commission, that no one had really taken an interest in it and then subsequent to that——

Mr. SHAYS. The people we shared it with didn't take interest in it.

Colonel SHAFFER. Right, exactly. And I didn't know until later when I talked to Dr. Zelikow that they had not heard about Able Danger. I mean, think about it for a second. I am a Major deployed undercover in a combat situation telling the chairman of the 9/11 Commission—the staff director for the first time about Able Danger when obviously now we know other officers more senior than me knew about it.

Mr. SHAYS. OK. So how would you define—the difference with our Specialist is that you saw illegal acts, correct?

Specialist PROVANCE. I was told about illegal acts, sir.

Mr. SHAYS. OK. This is the interesting part. If General Fay were to come before us, he would probably say to us he didn't have firsthand knowledge. But what it should have said to him is he needed to immediately send people and investigate.

Specialist PROVANCE. Yes.

Mr. SHAYS. And your testimony to us is that there appeared to be no interest in doing that.

Specialist PROVANCE. That's correct.

Mr. SHAYS. But you heard of illegal acts, and you reported them, as you should have.

In your case, it is not an illegal act. How would you define your need to blow the whistle?

Colonel SHAFFER. I would say in some cases misuse of Government resources and capabilities regarding pre-September 11th intelligence, failure to share information, and then after the fact, failure to adequately investigate those failures as part of the September 11th investigation. And then my last disclosure to Congress itself, sir, which came May of last year, I assumed up until May of last year that there was a classified annex to the September 11th report where Able Danger and other classified projects were listed. I come to find that did not exist and, therefore, I was asked to come forward with the information.

Mr. SHAYS. In the case of all of you—and I need a "yes" from each of you—you each have left the Government? Who is still gainfully employed in the area they were in?

Colonel SHAFFER. Well, I am still being paid by DIA as a GS–14 pending the outcome of whatever DOD investigation occurs.

Specialist PROVANCE. I still haven't received my clearance back or any official word as far as where it stands, and so the only thing I have been doing since being demoted is picking up trash and guard duty and things of that nature.

Mr. SHAYS. Since being demoted. It is amazing.

Mr. German.

Mr. GERMAN. I resigned from the FBI.

Mr. SHAYS. Now, in your case, you saw illegal acts.

Mr. GERMAN. Right.

Mr. SHAYS. And it is your testimony that those illegal acts are known by your superiors and including the former Director.

Mr. GERMAN. Yes. I reported it directly to the Director.

Mr. SHAYS. And you were not thanked, clearly.

Mr. GERMAN. No.

Mr. SHAYS. Mr. Tice.

Mr. TICE. I had my security clearance permanently revoked because of the so-called mental illness and ultimately was removed in May of last year.

Mr. SHAYS. Mr. Levernier.

Mr. LEVERNIER. I am currently retired, but when I made the disclosure of the unclassified, non-sensitive, unmarked document, not official use only, not sensitive, not anything, they stated that it was a sensitive document and that is why they took my clearance. And then I spent 5 years doing other administrative tasks.

Mr. SHAYS. I mean this somewhat facetiously, but you should be a Member of Congress because we did exactly what you did. We toured a few facilities. We saw the review. We thought it was an amazing failure to deal with reality, and reality was they did not need to get in and out, they only needed to get in. In our case, we were able to change the policy. In your case, you were saying, maybe before us, the very thing we were saying, and you were punished.

Mr. LEVERNIER. And it still exists today. I mean, the technical term in the Department of Energy is "recapture and recovery." The layman's term is, "Is the terrorist suicidal and willing to stand?" But the Admiral Mies report, 6 months old, said, "The recapture and recovery program in the Department of Energy is virtually nonexistent."

Mr. SHAYS. So let me tell each of you that we will personally be trying to deal with your personal cases. We as a committee will be trying to deal with your personal cases. We will ask for a full review for all of you that have suffered in any way for speaking out. So that is, frankly, my first interest, to deal with each of your circumstances. But, second, I think we know the system is broken.

Ms. Sharon Watkins was a whistleblower at Enron, but she was almost like national security. She only blew the whistle internally. And when she spoke to Ken Lay and others, they said, "We will check it out." And they asked the head of the law firm that they had hired and that made $23 million a year doing these corrupt things to do the investigation. She never went beyond that, to our knowledge. And the sad thing is the end result, what happened to Enron, what happened to Arthur Andersen, what happened to our economy in the process.

You have been asked lots of questions today. We thank you for your responses. I am going to ask you to do one other thing. I am going to ask each of you to give us a written document of how you think the system could be improved, some of you had it in your testimony mixed in with other information. The only thing we would like in your document is what you think we need to do to have the system work. And it does seem to me inherent in that is there has to be someone you can go to outside the agency; otherwise, you are like Sharon Watkins. You are telling Ken Lay he has a problem. And Ken Lay already knows it, sadly.

Is there anything any of you would like to put on the record, some closing comment, something you had prepared for that you wished we had asked and we did not? Anything you want to put on the record, we would like that now.

[No response.]

Mr. SHAYS. OK. Gentlemen, thank you for your service to your agencies. Thank you for your service to your country. Thank you for helping us in Congress try to sort this out.

Our next panel is Mark Zaid from Washington, DC; Ms. Beth Daley, senior investigator, Project on Government Oversight, referred to as POGO; Tom Devine, legal director, Government Accountability Project; and Dr. William G. Weaver, National Security Whistleblowers Coalition.

This hearing is still going on. We need people to sit. We need our next witnesses, and there will be no talking, please.

If you would all stand, please? Stay standing, please.

[Witnesses sworn.]

Mr. SHAYS. Note for the record our witnesses have responded in the affirmative. Thank you all for listening to the first panel. I would like to thank our Inspector Generals who have been here for the first panel and now the second panel, I would like to thank them as well for waiting to be the third panel.

We will now hear from you, Mr. Zaid.

STATEMENTS OF MARK S. ZAID, ESQ., MANAGING PARTNER, KRIEGER & ZAID, PLLC, WASHINGTON, DC; BETH DALEY, SENIOR INVESTIGATOR, PROJECT ON GOVERNMENT OVERSIGHT; THOMAS DEVINE, LEGAL DIRECTOR, GOVERNMENT ACCOUNTABILITY PROJECT; AND WILLIAM G. WEAVER, SENIOR ADVISOR, NATIONAL SECURITY WHISTLEBLOWERS COALITION [NSWBC]

STATEMENT OF MARK S. ZAID

Mr. ZAID. Good afternoon, Mr. Chairman, members. It is a pleasure to testify once again before this distinguished subcommittee. While I know that the members of the subcommittee personally view this topic with great seriousness, it is long overdue that Congress exercises its full weight to create adequate protections for national security whistleblowers as well as anyone who falls victim to a security clearance process that is rife with abuse. I applaud your interest and your efforts, but this hearing must be considered only the first step.

I have been representing whistleblowers and defending security clearance cases for more than 10 years now. The need for whistleblowers, especially those from within the tight-lipped national security community, is now of even grater importance in the wake of September 11th, as well as due to the ever increasing tug of war between the need to protect national security at the potential expense of our valued civil liberties.

A security clearance has grown to become a valuable commodity. It is no longer viewed as simply a requirement of certain Federal employment. It could lead to wealth and power, but at the same time it can be used to open doors, it can be used to ruin lives, particularly against those within the intelligence community who have

known nothing else during their careers but a covert environment. For one thing, as was mentioned, loss of a clearance will result in loss of employment. Moreover, for many in the intelligence community, loss of a clearance effectively precludes them from finding any work in their chosen field. To them an active security clearance represents their life plain and simple. Thus, it is far more than "subtle" retaliation. Retaliation against whistleblowers is common and takes many forms, whether you have a clearance or not. For those who do hold a clearance, one manifestation is either suspension, denial, or revocation.

Additional statutory amendments are required, and my esteemed colleagues on the panel will no doubt specifically address that aspect. What I would like to do is talk about what generally needs to be done in the security clearance field because to correct some of those general problems will address some of the specific ones for whistleblowers.

More than 2 million people hold security clearances, and the number of those who ultimately become whistleblowers is few. Indeed, the number will be statistically insignificant. Yet any one of those millions of people who hold a clearance face the possibility that the clearance, which is designed to act as a shield to protect the national security interests of the United States, will be used as a sword against them for malicious, frivolous, unjustifiable, or inappropriate reasons. While the vast majority of those holding clearances will never find themselves in that predicament, those that do will find themselves facing a hostile environment that can at times be rift with vindictiveness and retaliatory behavior.

Unfortunately, it is virtually impossible to prove that an adverse clearance decision was initiated based solely on a whistleblower's activities. To be sure, the initiation of proceedings, as well as the time, can often be at least circumstantially tied to the willing's status, but the actual suspension or revocation will typically have, at least arguably, a justifiable independent basis. There are so many regulations that Federal employees run afoul in the common course of their business, as well as the existence of generic catch-alls within the security framework, that it is not at all difficult to target someone's clearance and achieve the intended objective of removal.

In fact, the various security offices within the agencies will not care as to the manner or motive that led the allegations to come to their attention as they are viewed as generally irrelevant. It is not an available defense in responding to security allegations that the person who filed the allegation was retaliating against you or that the motivating factor was whistleblowing activity. The only thing that matters is the accuracy of the allegation, not the source, not the motive.

Executive Order 12968, issued by President Clinton in 1995, created the current framework for the granting, denial, or revocation of security clearances. It talks about, as was said, the whole-person concept. That is bad and good. The ultimate determination is one of common sense. Obtaining a favorable resolution to a clearance appeal is generally more based on demonstrating mitigation circumstances or mitigating factors rather than necessarily refuting the actual allegations.

In my written testimony, I have detailed some of the numerous problems that occur typically across the board at different agencies. Very quickly, they include significant delays; unpaid suspensions during the clearance process, which you can imagine the problems that adds when someone is on unpaid leave for 1 year pending an adjudication; refusal to transfer existing clearances from one agency to the next as a means of retaliation. There are others that I list.

I have also detailed several examples of security clearance cases I have handled, both favorable and unfavorable, at various agencies that show you the types of circumstances that will occur.

In closing, what I would like to do is just give you a few specific recommendations, and I have detailed them in my written testimony. I will just say a couple here.

One would be to create an independent body outside of the Federal agency involved. That could also be the Federal judiciary. Right now, a Supreme Court case precludes any Federal court from hearing a substantive security clearance appeal, no matter whether even if it is based on discrimination, if it goes to the heart of the substantive allegations, unless you are challenging procedural inefficiencies or constitutional violation, both of which are extremely difficult to prove, and, frankly, very rarely happen, then you have no recourse in the Federal judiciary whatsoever. Most judges will claim based on Egan that they don't have the capability or the knowledge or ability under jurisdiction to hear a case. Yet you have administrative judges under Article I who hear national security clearance cases every day at the Department of Defense and the Department of Energy. I cannot imagine an Article III judge cannot do the same.

Require all Federal agencies to audiotape the security interviews and the polygraph sessions. Many of these cases come down to who said what and how exactly in the context did they say it.

Also, legislate additional protections into the system to include the release of information—right now many agencies will withhold even unclassified information—and more allow attorneys to be able to take part in that process more so than today.

In the testimony I detail the numerous attempts and efforts, mostly successful, where agencies have blocked me despite my having authorized access to classified information from possessing information that would help me represent my client, even if the information is at the same clearance level that I have allegedly been granted access to.

Those are but just some of the examples I would hope you would consider. I thank you for the opportunity. I can answer any additional questions or comments during the Q&A. Thank you.

[The prepared statement of Mr. Zaid follows:]

FORMAL WRITTEN TESTIMONY OF MARK S. ZAID, ESQUIRE*

DELIVERED BEFORE THE
SUBCOMMITTEE ON NATIONAL SECURITY, EMERGING
THREATS, AND INTERNATIONAL RELATIONS
COMMITTEE ON GOVERNMENT REFORM,
U.S. HOUSE OF REPRESENTATIVES

National Security Whistleblowers in the post-9/11 Era:
Lost in a Labyrinth and Facing Subtle Retaliation

FEBRUARY 14, 2006

Good afternoon Mr. Chairman, Members of the Subcommittee, it is a pleasure to testify once again before this distinguished Subcommittee.

I cannot emphasize enough the importance of today's hearing. While I know that Members of this Subcommittee personally view this topic with great seriousness, it is long overdue that Congress exercises its full weight to create adequate protections for national security Whistleblowers as well as anyone who falls victim to a security clearance process that is rife with abuse. I applaud your interest and your efforts, but this hearing must be considered only the first step. The need for Whistleblowers, especially those from within the tight-lipped national security community, is now of even greater importance in the wake of 9/11, as well as due to the ever increasing tug of war between the need to protect national security at the potential expense of our valued civil liberties.

A security clearance has grown to become a valuable commodity, especially in and around Washington, D.C. It is no longer viewed as simply a requirement of certain federal employment. To hold a valid security clearance is to possess access, and access in this town can be equated with power. Additionally, it offers the capability to derive significant financial benefits at levels far in excess ever seen or possible during federal employment.

At the same time it can be used as a ticket to open doors, it can also be used to ruin lives, particularly against those within the Intelligence Community who have known nothing else during their careers but a covert environment. For one thing, loss of a security clearance automatically results in the termination of any federal employment that requires possession of clearance as a prerequisite. Moreover, for many in the Intelligence Community loss of a clearance effectively precludes them from finding any work in their chosen field. To them an active security clearance represents their life plain and simple. Thus, it is far more than "subtle" retaliation, though its use as a retaliatory tool can be analogously viewed as similar to simply pushing a small snow ball down a hill and watching it grow ever larger and larger. It does not take much to initiate the retaliation but the consequences arising from the loss of a security clearance are very serious.

Few individuals strive to, or even after the fact desire to, become a Whistleblower. Many times they become a Whistleblower because of frustrations encountered with their own

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agency in trying to find someone who would either listen or act on the expressed concerns.[1] Unfortunately, particularly given the laudable role most Whistleblowers have played in our history, to be designated a Whistleblower is to be typically viewed with scorn within the federal community and witness a destructive end to a career. Federal agencies, of course, encourage Whistleblowing and assure the individual, through written policies and high-ranking speeches, that they will be protected. Sadly, that is nothing more than rhetoric.[2]

In reality an individual's categorization or even perception as a Whistleblower is often equivalent to an invitation to the door. For those Whistleblowers who chose to remain employed with their federal agency, if that choice even presents itself, the repercussions and ostracization can be quite traumatizing. It envelops not only their professional life, but permeates their personal life as well. Retaliation against Whistleblowers is common and takes many forms, whether one holds a clearance or not. For those who do hold a clearance, one manifestation is the suspension, denial or revocation of that security clearance.

This hearing, however, represents just the tip of the iceberg. I have spent the majority of my legal career, now nearing 15 years, representing Whistleblowers of all types and defending security clearance cases across the federal spectrum. The alleged existing protections provided to any generic Whistleblower, whether statutory, regulatory or judicial, are so weak or limited that I rarely, if ever, even consider them as available or worthy of review. The cost incurred in seeking to pursue remedies, especially through litigation, is simply not worth the minuscule chance of success. Instead, remedies afforded through other statutory or regulatory provisions, such as the Privacy Act, the Federal Tort Claims Act, the Administrative Procedure Act or the Constitution, are often pursued as substitutes.

For those Whistleblowers employed or contracted to the Intelligence Community, the scope of remedies is even more limited. There is simply no genuine protection. Absent significant media attention (and often even that may only serve as a temporary reprieve from retaliation) or the adoption of the cause by a high-ranking Member of Congress, the chance for survival, or even maintaining the status quo, is often slim.

Additional statutory amendments are required and my esteemed colleagues on this Panel will no doubt address those issues directly as they pertain to Whistleblower protection. But in

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[1] In the cases of national security Whistleblowers, in particular, individuals should generally first attempt to report concerns or problems through their relevant chain of command (if possible), and/or to their agency's internal or larger component's Office of Inspector General, any appropriate Office of Professional Responsibility or the Office of Special Counsel (if available). Outside of the Executive Branch individuals can also approach the relevant Congressional oversight committees and in certain situations individual Members of Congress (though Whistleblowers have to be particularly sensitive in determining that the Member or their staff holds the appropriate security clearance if classified information is at issue). Finally, usually as a last resort, the media or watchdog entities can be considered. In identifying non-governmental venues that are available to national security Whistleblowers to provide information, I am in no way condoning or recommending that any individual acts to commit the unauthorized and unlawful release of properly classified information.

[2] Interestingly, Executive Order 12958 encourages a mild form of Whistleblowing for "Authorized holders of information who, in good faith, believe that its classification status is improper." These individuals "are encouraged and expected to challenge the classification status of the information in accordance with agency procedures." Yet the Information Security Oversight Office, which handles such challenges, informed me that only one person, who I happened to represent during the proceedings, has ever sought to utilize this provision despite its existence for more than a decade. Given the ease by which this form of Whistleblowing could occur, even with some degree of anonymity, I would submit this is reflective of the unfriendly environment of and perception for national security Whistleblowers.

order to understand what needs to be done to shelter Whistleblowers from abuses surrounding their security clearance an examination of and modification to the security clearance system in general will be necessary. The two are not isolated in any way. Addressing the more general problem may serve to correct the specific concern.

More than 2 million people alone have security clearances that permit access to Secret information.[3] Clearances can permit access to a range of information from Confidential to Top Secret code-words so high that even the names of the compartments are themselves classified. Yet the number of those people who will ultimately become a Whistleblower is few. Indeed, the number will be statistically insignificant.

Yet any one of the millions of people who hold a clearance face the possibility that their security clearance, which is designed to act as a shield to protect the national security interests of the United States, will be used as a sword against them for malicious, frivolous, unjustifiable or inappropriate reasons. While the vast majority of those holding clearances will never find themselves having to defend their ability to maintain a clearance, those that do will often find themselves facing a hostile environment that offers little objective protections and can, at times, be rift with vindictiveness and retaliatory behavior. In fact, in recent years I have personally observed that many agencies have begun to use clearance decisions as a substitute for personnel actions that would otherwise afford the employee greater opportunity or ability to challenge and overcome.

Moreover, it is virtually impossible to prove that an adverse clearance decision was initiated based solely on a Whistleblower's activities. To be sure the initiation of proceedings, as well as the timing, can often be at least circumstantially tied to the Whistleblower's status, but the actual suspension or revocation will typically have, at least arguably, a justifiable independent basis. There are so many regulations that federal employees run afoul in the common course of their business, as well as the existence of generic catch-alls within the security framework, that it is not at all difficult to target someone's clearance and achieve the intended objective.

In fact, the various agency security offices will not care as to the manner or motive that led allegations to come to their attention as they are viewed as generally irrelevant. Despite the conventional thinking that many federal employees regularly try to argue, it is not an available defense in responding to a security allegation that the person who filed the allegation was retaliating against you or that the motivating factor was Whistleblowing activity. The only thing that matters is the accuracy of the allegation, not the source or the motive.

As I noted, I have been litigating cases involving national security claims (which has included my authorized access to classified information up to the TS/SCI level) for more than a decade, and I have handled several dozen security clearance cases before numerous federal agencies. I am also co-teaching a DC Bar Continuing Legal Education class on defending adverse security clearance decisions this Spring. Additionally, my firm has represented hundreds of federal employees and contractors within the Intelligence and Military Communities regarding matters that touch directly upon national security issues. The experience I bring before you today is crucial to understanding exactly how the security clearance environment operates for unlike our legal system precedent plays little to no role. Indeed, only two agencies – the Department of Defense and Department of Energy – even

[3] Report on the Commission of Protecting and Reducing Government Secrecy, S. Doc. 105-2, 103rd Cong. (1997).

publish decisions in security clearance cases that are available to the public, and these are at best incomplete in offering a portrait of the system.[4]

Thus, anecdotal experience is really the only true manner in which to obtain information about the process and the results. Of course, anecdotal experience has its own drawbacks because it is limited to specific cases and the experiences of those relaying their knowledge. Nevertheless, having studied this issue and conversed with colleagues who often routinely handle these types of cases, I can at least provide this Subcommittee with a realistic and likely accurate depiction of the current circumstances.

That being said, there are many shining examples of how some agencies, and the individuals who are employed therein, implement their security clearance programs, and my testimony today is in no way designed to ignore or minimize the excellent contributions many make to the system. However, it is necessary to present the darker side of the process that continues to increasingly spread throughout the system in order to bring about necessary change.

To be sure, I have little doubt that some agencies will complain that they lack either the manpower or financial resources, or perhaps both, to address some of the problems I have identified. For some agencies, or even all, this may be true. But that is no justification for the allowance of abuses to continue or the failure to ensure both substantive and procedural due process exists.

BRIEF LEGAL ANALYSIS SURROUNDING CHALLENGES TO ADVERSE DECISIONS

Following World War II, various presidents have issued a series of Executive Orders designed to protect sensitive information and to ensure its proper classification throughout the Executive Branch.[5] Those afforded the luxury of a security clearance are typically required to undergo a background investigation that varies according to the degree of adverse effect the applicant could potentially have on the national security, i.e., the higher the level of clearance that is to be granted the greater the potential threat to national security and the risks that must be assessed.[6]

It is now unquestionable that except in very, very limited circumstances, there does not exist any right to judicial review of any aspect of a substantive security clearance determination.[7] The U.S. Supreme Court made this perfectly clear in, and all that is needed to

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[4] The Department of Defense issues its opinions at *http://www.defenselink.mil/dodgc/doha/industrial/* while the Department of Energy's decisions can be found at *http://www.oha.doe.gov/persec2.asp*.

[5] See e.g., Exec. Order No. 10290, 3 C.F.R. 789 (1949-1953 Comp.); Exec. Order No. 10501, 3 C.F.R. 979 (1949-1953 Comp.); Exec. Order No. 11652, 3 C.F.R. 678 (1971-1975 Comp.); Exec. Order No. 12065, 3 C.F.R. 190 (1979); Exec. Order No. 12356, § 4.1(a), 3 C.F.R. 174 (1983); Exec. Order No. 12968, 60 Fed.Reg. 19,825 (1995).

[6] See Exec. Order No. 10450, § 3, 3 C.F.R. 937 (1949-1953 Comp.).

[7] The primary exceptions are challenges to procedural due process violations (i.e., failure of an agency to afford certain administrative rights or abide by applicable regulations) or an allegation of a Constitutional violation (virtually impossible to prove). See e.g., Webster v. Doe, 486 U.S. 592 (1988); Service v. Dulles, 354 U.S. 363, 373 (1957); Stehney v. Perry, 101 F.3d 925 (3rd Cir. 1996); Hill v. Dep't. of Air Force, 844 F.2d 1407, 1412 (10th Cir. 1988).

be known is, the landmark case of Department of Navy v. Egan.[8] Since this decision time and time again federal courts have declined to address substantive clearance decisions.[9] Denial of relief is primarily based on the premise that the courts lack appropriate jurisdiction or knowledge to adjudicate or review the merits of any security clearance determination.

In Egan the Court ruled that "[i]t should be obvious that no one has a 'right' to a security clearance. The grant of a clearance requires an affirmative act of discretion on the part of the granting official. The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'"[10] The Court also noted that "a clearance does not equate with passing judgment upon an individual's character. Instead, it is only an attempt to predict his possible future behavior and to assess whether, under compulsion of circumstances or for other reasons, he might compromise sensitive information. It may be based, to be sure, upon past or present conduct, but it also may be based upon concerns completely unrelated to conduct, such as having close relatives residing in a country hostile to the United States." "The attempt to define not only the individual's future actions, but those of outside and unknown influences renders the 'grant or denial of security clearances . . . an inexact science at best.'"[11]

To those who believe their clearance determinations were inappropriately or even vindictively pursued, the Court condemned any realistic chance of judicial oversight when it opined that:

> Predictive judgment of this kind must be made by those with the necessary expertise in protecting classified information. For "reasons . . . too obvious to call for enlarged discussion," the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it. Certainly, it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk. The Court accordingly has acknowledged that with respect to employees in sensitive positions "there is a reasonable basis for the view that an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the final say in deciding whether to repose his trust in an employee who has access to such information." As noted above, this must be a judgment call. The Court also has recognized "the generally accepted view that foreign policy was the province and responsibility of the Executive." "As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities." *Thus, unless Congress specifically has provided otherwise*, courts traditionally

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[8] 484 U.S. 518 (1988).

[9] The cases could be listed ad naseum. See generally Bennett v. Chertoff, 425 F.3d 999 (D.C.Cir. 2005); Ryan v. Reno, 168 F.3d 520 (D.C.Cir. 1999); Stehney, 101 F.3d at 932; Dorfmont v. Brown, 913 F.2d 1399 (9th Cir. 1990), cert. denied, 499 U.S. 905 (1991).

[10] Egan, 484 U.S. at 528.

[11] Id. at 528-529 (internal citations omitted).

> have been reluctant to intrude upon the authority of the Executive in military and national security affairs.[12]

Now is the time for Congress to meet the Judiciary's challenge head-on. In order for any legitimate oversight to exist in the realm of security clearances, whether it be to protect Whistleblowers specifically or anyone facing retaliation or unjustified punishment for whatever reason, Congress must take action.

GENERAL EXPLANATION OF SECURITY CLEARANCE APPEAL PROCESS

Executive Order 12968, issued by President Clinton in 1995, created the current framework for the granting, denial or revocation of security clearances. Section 5.2 sets forth the minimum requirements an agency must provide for denials or revocations of eligibility for access. Applicants and employees who are determined to not meet the standards for access to classified information established in Section 3.1 of the Order shall be:

> (1) provided as comprehensive and detailed a written explanation of the basis for that conclusion as the national security interests of the United States and other applicable law permit;
> (2) provided within 30 days, upon request and to the extent the documents would be provided if requested under the Freedom of Information Act (5 U.S.C. 552) or the Privacy Act (3 U.S.C. 552a), as applicable, any documents, records, and reports upon which a denial or revocation is based;
> (3) informed of their right to be represented by counsel or other representative at their own expense; to request any documents, records, and reports as described in section 5.2(a)(2) upon which a denial or revocation is based; and to request the entire investigative file, as permitted by the national security and other applicable law, which, if requested, shall be promptly provided prior to the time set for a written reply;
> (4) provided a reasonable opportunity to reply in writing to, and to request a review of, the determination;
> (5) provided written notice of and reasons for the results of the review, the identity of the deciding authority, and written notice of the right to appeal;
> (6) provided an opportunity to appeal in writing to a high level panel, appointed by the agency head, which shall be comprised of at least three members, two of whom shall be selected from outside the security field. Decisions of the panel shall be in writing, and final except as provided in subsection (b) of this section; and
> (7) provided an opportunity to appear personally and to present relevant documents, materials, and information at some point in the process before an adjudicative or other authority, other than the investigating entity, as determined by the agency head. A written summary or recording of such appearance shall be made part of the applicant's or employee's security record, unless such appearance occurs in the presence of the appeals panel described in subsection (a)(6) of this section.

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[12] Id, at 530 (internal citations omitted, emphasis added).

Significant discretionary exceptions exist throughout the implementation of the above minimum standards as well as elsewhere within the relevant Sections. Within the Order itself, for example, subsection (c) while noting that agencies may "provide additional review proceedings beyond those required by subsection (a) of this section. This section does not require additional proceedings, however, and creates no procedural or substantive rights." Moreover, subsection (d) permits an agency to certify that if "a procedure set forth in this section cannot be made available in a particular case without damaging the national security interests of the United States by revealing classified information, the particular procedure shall not be made available. This certification shall be conclusive." Finally, not surprisingly, Section 7.2 (e) notes that "[t]his Executive order is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right to administrative or judicial review, or any other right or benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person." Agency implementation of the Executive Order varies significantly throughout the federal government and inconsistencies exist even within the same agency.[13]

The current adjudicative guidelines have been, though issued in 1995, in effect throughout the Government since 1997 (but have been or are about to be superseded by new guidelines issued on December 29, 2005 that are more favorable to prospective clearance holders). The Guidelines pertain to all U.S. government civilian and military personnel, consultants, contractors, employees of contractors, licensees, certificate holders or grantees and their employees and other individuals who require access to classified information. "They apply to persons being considered for initial or continued eligibility for access to classified information, to include sensitive compartmented information (SCI) and special access programs (SAPs) and are to be used by government departments and agencies in all final clearance determinations."[14]

As the 1995 Guidelines make perfectly clear:

> the adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance. Eligibility for access to classified

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[13] For example, since October 2000, hundreds of individuals have had their security clearance revoked due to the enactment of the Smith Amendment, 10 U.S.C. § 986. This Act prohibits the Department of Defense from granting or renewing a security clearance to anyone who was convicted of a crime and sentenced to more than a year in jail. It applies to those who are employees of the Department of Defense, a member of Armed Forces on active or inactive status, or an employee of a defense contractor. As my colleague Sheldon Cohen has noted, "the Smith Amendment has been handled differently not only among the military departments, but even within the Office of the Secretary of Defense, notably regarding the effect of a pardon. The Defense Office of Hearings and Appeals (DOHA) which handles contractor employee cases, has ruled that a pardon does *not* eliminate Smith Amendment consideration. On the other hand, the Washington Headquarters Services, Clearance Appeals Board which reviews clearances for government employees *does* consider that a state pardon removes the case from Smith Amendment sanction." See Cohen, Sheldon, "Smith Amendment Update" (May 2004) (emphasis original), available at *http://www.fas.org/sgp/eprint/smithamend2.pdf*. Frankly, the manner in which agencies established even the basic framework for the appeal process varies across the board. Some agencies grant personal appearances as the initial level of appeal, others permit written submissions. Some agencies hold appeal panels for the individual to appear before, but some offer panels where the identities of the deciding officials are not even known. Some agencies allow hearings with live witnesses before an administrative judge, whereas others only the petitioner can appear before a judge. The list of differences and variances goes on and on.

[14] *http://www.dss.mil/nf/adr/adjguid/adjguidF.htm*.

> information is predicated upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. In evaluating the relevance of an individual's conduct, the adjudicator should consider the following factors:
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> a. The nature, extent, and seriousness of the conduct;
> b. The circumstances surrounding the conduct, to include knowledgeable participation;
> c. The frequency and recency of the conduct;
> d. The individual's age and maturity at the time of the conduct;
> e. The voluntariness of participation;
> f. The presence or absence of rehabilitation and other pertinent behavioral changes;
> g. The motivation for the conduct;
> h. The potential for pressure, coercion, exploitation, or duress; and
> i. The likelihood of continuation or recurrence.
>
> Each case must be judged on its own merits, and final determination remains the responsibility of the specific department or agency. Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security. *The ultimate determination of whether the granting or continuing of eligibility for a security clearance is clearly consistent with the interests of national security must be an overall common sense determination based upon careful consideration of the following, each of which is to be evaluated in the context of the whole person.*[15]

Thirteen adjudicative categories exist that can be addressed individually or collectively where deemed appropriate to deny or revoke an individual's security clearance.[16] Each has a non-exhaustive list of disqualifying circumstances that can raise security concerns and conditions that conceivably can mitigate security concerns.

Obtaining a favorable resolution to a security clearance appeal is primarily based on demonstrating that mitigating circumstances exist rather than necessarily refuting the allegations against the individual. As an extreme example, it is possible that someone who committed murder can be granted a security clearance. As mitigation the individual could show that the incident occurred years earlier when he was a minor, and that he has acted as an exemplary citizen ever since. Or, more commonly, the case would be where an individual who was arrested for a DUI would need to demonstrate why that incident was the exception rather than the norm.

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[15] Id. (emphasis added).

[16] They are Guideline A: Allegiance to the United States; Guideline B: Foreign influence; Guideline C: Foreign preference; Guideline D: Sexual behavior; Guideline E: Personal conduct; Guideline F: Financial considerations; Guideline G: Alcohol consumption; Guideline H: Drug involvement; Guideline I: Emotional, Mental, and Personality Disorders; Guideline J: Criminal conduct; Guideline K: Security violations; Guideline L: Outside activities; and Guideline M: Misuse of information technology systems.

Arriving at a security clearance determination, however, is not entirely based simply on past events. The adjudicator is being called upon to assess unpredictable future behavior. Virtually any act can serve as the basis to revoke or deny an individual a security clearance. The conduct in question could have taken place completely outside the context of work, years prior or include actions that have previously been favorably adjudicated.

EXAMPLES OF ABUSE AND PROBLEMS THAT DOMINATE THE FEDERAL SECURITY CLEARANCE SYSTEM THAT REQUIRE ATTENTION

As described above, other than being certain administrative rights, though limited they may be, no other venue exists to challenge a substantive adverse security clearance decision.

Some of the other problems that inherently exist across the board at the different agencies include:

- *Significant delays*. For most agencies the entire clearance appeal process routinely takes from one to two years to conclude. Sometimes even longer. Few agencies will resolve a clearance dispute in less than six months to one year. During that time the individual may be in an unpaid status as a federal employee or face loss of their employment as a federal contractor since their access has been suspended. The CIA process is so lengthy for contractors and applicants that it, quite candidly, appears deliberately designed to encourage individuals to simply withdraw their appeals.

- *Unpaid suspension during pendency of clearance processing.* Some agencies will suspend employees without pay while their clearance status is adjudicated.[17] Given that the process, even for employees, can take months to resolve, it does not require a stretch of the imagination to fathom the severity of the consequences that such action will impose upon an individual and his family. Suspensions are no-mans land and can often be worse than actually facing a clearance revocation or denial where at least administrative rights are afforded to the individual. Worse, though suspensions are realistically the equivalent of a scarlet letter that negatively taints an individual, it is not considered an adverse personnel action that in and of itself can be challenged. That allows it to be used in a retaliatory fashion to punish individuals including Whistleblowers. There is typically no time frame that an agency must abide by when addressing suspension actions. Ultimately the only true recourse is to seek judicial review under the Administrative Procedure Act not for the substantive suspension but to challenge the unreasonable delay in adjudicating the matter.

- *The employee/contractor must absorb all financial loses.* Except in an extremely limited circumstance in a DOHA proceeding, the loss of any wages, bonuses, and attorney's fees incurred by the individual are borne by that person even when the final resolution is favorable and their clearance is restored. That includes situations where the person was in

[17] Such agencies include the Departments of Air Force and Army. Suspension without pay is not a requirement or mandated by any regulation or force of law. It is nothing less than an intentional personnel choice that is made by the agency on a case by case basis. Some agencies, in fact, will provide unclassified paid work to its employee whose clearance is suspended. To its credit, the DIA will routinely suspend its employees in a paid status while their clearance process is underway. This management decision appears to recognize that it is not at all uncommon for the DIA process to take anywhere between 12-24 months before a final resolution is reached. In only one case in the 13 years I have represented DIA employees has DIA moved to suspend an employee without pay, and that was recently with respect to national security Whistleblower Anthony Shaffer

unpaid status during the entire time. This prompts many to either forgo appeals and silently disappear or consider handling their case *pro se*.

- *No chance to confront accusers.* The closest that an individual is provided to confront the allegations against them is written documentation, usually in redacted form. Sometimes the individual is permitted to know the identity of the individual who has provided derogatory information against them, but only when the supplier of the information permits the disclosure of their identity pursuant to the Privacy Act. Only DOHA and DOE typically permit live witnesses to appear during administrative proceedings, and these witnesses are routinely only from the applicant's side. Rarely will an individual ever be permitted to challenge a live witness who has provided alleged derogatory information.

- *Access to underlying records is often limited.* Only the bare minimum of information is often provided to an individual facing denial or revocation of their security clearance. Many agencies hide behind the cloak of "classification" to withhold information from the individual, even when the individual themselves or their attorney possess the requisite clearance level. This, of course, significantly constrains the individual's ability to challenge the allegations levied against them. On some occasions an agency does utilize and rely upon information outside the permitted scope of the evidence which prevents any meaningful challenge.

- *Defense contractors are granted greater rights than contractors at other federal agencies or even federal employees.* Initial DOHA administrative proceedings, though subject to their own criticisms, offer some of the best and fairest possibilities towards reversing an adverse clearance decision. Witnesses are permitted on behalf of the individual, and rules of evidence, relaxed they might be, are in effect. An Administrative Judge hears all claims and renders a written decision. Department Counsels are invariably, with few exceptions, fair and professional in their handling of cases. There is simply no reason why this type of challenge cannot be permitted throughout the federal system. The Department of Energy offers a similar mechanism.

- *Delay of implementation of new Adjudicative Guidelines.* On December 29, 2005, National Security Advisor, Stephen Hadley, issued a new set of Adjudicative Guidelines which were approved by the President.[18] These Guidelines significantly modified the previous version mostly, if not entirely, in favor of the individual clearance holder or prospective holder. This is especially true with respect to Foreign Influence concerns (i.e., an individual having foreign relatives abroad or in the United States). Hadley's cover memorandum notes that the Guidelines are to be implemented immediately. This, however, has set off a rash of disputes throughout the federal government with agencies differently interpreting that instruction. The Justice Department, for example, takes the position that the Guidelines are effective upon issuance and should be applied immediately. Yet the Department of Defense, and its numerous entities, asserts the Guidelines must be subject to a notice (and perhaps comment) period that means, based on the implementation of the prior Guidelines, a delay of 12-18 months.

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[18] A copy of the new Guidelines can be found at the website for the Information Security Oversight Office (ISOO) at *http://www.archives.gov/isoo/pdf/hadley-adjudicative-guidelines.pdf*. ISOO is a component of the National Archives and Records Administration (NARA) and receives its policy and program guidance from the National Security Council (NSC).

- *Refusal to transfer existing clearances.* This method of retaliation is subtle but quite effective. Section 2.4 of Executive Order 12968 requires that "eligibility determinations conducted under this order shall be mutually and reciprocally accepted by all agencies." Based on my experiences the CIA, in particular, routinely utilizes this tactic especially against defense contractors. The typical situation involves a defense contractor with an "unfavorable" past history or experience with CIA or its officials. The CIA either "sits" on the transfer of the clearances for such a period of time that the contractor is forced to reassign or terminate the individual or perhaps verbally tells the contractor's Facility Security Officer that the individual has unspecified "problems" that may lead to a denial if the clearance is further pursued. Such a statement can prompt either the recission of the clearance request or the termination of the individual. In neither of these above situations is the individual ever afforded any opportunity to challenge the conduct. Thus, an agency can act with complete impunity while imparting serious consequences to the individual.

- *Time delay punishment for reevaluation following initial favorable DOHA decision that is overturned on appeal.* Section E3.1.37 of DoD Directive 5220.6 (1992) states that an "applicant whose security clearance has been finally denied or revoked by the DOHA is barred from reapplication for 1 year from the date of the initial unfavorable clearance decision." The positive intended effect of this provision is actually to ensure an individual is not penalized from pursuing an appeal following the issuance of an unfavorable initial hearing decision. That is, if an individual is denied a clearance by a decision issued January 1st and appeals that decision, they are eligible for reconsideration no matter the outcome of the appeal the following January 1st of the next calendar year. However, the practical effect of this provision also serves to unfairly penalize those individuals who prevail at their administrative hearing but then face an appeal by the Government. During the pendancy of the appeal that individual remains in absolute clearance limbo and should they ultimately lose to the Government on appeal the one year time clock does not begin to run until the appeal decision is issued. This date may be long after the one year period would have expired. For example, if an individual receives a favorable administrative decision on January 1st and the Government appeals, and that appeal results in a reversal nine months later (which unfortunately would not be an unusual lapse of time) on September 1st, this provision would not apply. The individual could not have their clearance access reconsidered until the following September 1st resulting in a loss of nearly one year of valuable time that may have directly caused the individual to lose his business or employment.

- *Central Intelligence Agency.* While I have generally not singled out any particular agency during my testimony, my experiences with the CIA require me to comment specifically on the manner in which they implement their clearance proceedings. For one thing, the personal appearance is little more than a meeting with a representative of the CIA's Office Security. That Agency official rarely engages in any substantive exchange with the individual or their representative. They serve as a glorified note taker and document recipient. The meeting offers little to nothing beyond the equivalent of a written submission and appears designed to merely meet the bare minimum (arguably) requirements of Executive Order 12968. Unlike with other federal agencies, the chance for success in persuading the CIA to overturn ant adverse security clearance decision is virtually slim to non-existent. The perceived attitude is that to reverse its own decision would be to admit fault in arriving at the decision in the first place. Initial appeal decisions routinely provide little to no substantive feedback or explanation that could assist an individual to prepare a second level appeal. Indeed, as one former CIA attorney once told me even "factual impossibility" is no defense.

It is also my opinion, and that of some of my colleagues, that the CIA purposefully permits its challenge process to languish in order to dissuade individuals from pursuing or completing their appeals. The CIA will also routinely withhold significant substantive segments of the underlying documentation that is being relied upon for the basis of the clearance action. For applicants the operative document is typically the polygraph report and any perceived admissions that occurred before or after the actual examination. Although the applicant at this time does not yet possess a security clearance and the examination itself is not classified, the CIA routinely classifies much of the polygraph report to include alleged incriminating statements uttered by the applicant. Given that it is the applicant's own alleged admissions being used as evidence to justify the denial of a clearance, it would seem logical to release that information to the individual so that they can properly and fully respond to the accusations. When that is requested the CIA's usual response is to simply "ask your client what they said" or "your client knows what they said." Of course, the fact that the interrogation session in question was likely 18-24 months earlier has never seemed to bother the CIA as a matter of due process.

- *Foreign preferences.* The Intelligence and Defense Communities are particularly strict and inconsistent in arriving at determinations involving foreign preferences, i.e., the existence of foreign relatives in the United States or abroad. Each case must, of course, be determined by the specific facts that exist. However, the inconsistencies in the decisions involving countries that are either perceived as "enemies" of the United States or on the front lines in the war against terrorism (i.e., Middle Eastern States) should be viewed as unacceptable. In one DOHA case I had in 2004 involving Pakistan, the contractor had bare minimum contacts with his elderly parents and siblings. The Judge determined that since Pakistan was on the front lines in the war against terrorism and terrorists frequented the area it was too dangerous to allow this individual to hold a security clearance even though the Executive Branch, which determines foreign policy, held contrary positions regarding Pakistan. Yet three years earlier, just weeks after September 11th, another DOHA Judge held, based on similar facts, that as Pakistan was on the front lines in the war against terrorism, and was side-by-side with the United States, the contractor was qualified for a clearance. I have also repeatedly seen agencies deny clearances to individuals from the very countries where our need is actually the greatest to have qualified individuals who speak the native language. The cited factors are completely outside of the individual's control, and there is absolutely no genuine evidence (at least that is publicly available) to support that the assessed risk is greater for one individual than another, though the inconsistencies are frequent.

- Agencies will typically throw the proverbial kitchen sink at those who face revocation/denial proceedings and attempt to revive incidents that occurred many years earlier. This occurs even if those very incidents had already been investigated and mitigated and led to the individual being granted a security clearance. The agency's justification is that somehow these prior acts comprise a pattern and practice of concerned conduct. Of course, there may be instances where this is completely appropriate such as an individual has a history of drunk driving. The prior incidents can and should be utilized, particularly absent significant mitigating factors, as a basis upon which to predict future behavior. However, there must be some sort of nexus between the events that are being tied together.

  The fact that someone may also find himself a national security whistleblower complicates the equation. It is seemingly impossible to prove that an agency is retaliating

against someone for the purposes of ridding itself of a whistleblower. To be sure it does happen. But because any incident, no matter how minor, can serve as the basis for the revocation of a clearance, it is simple fodder to use a clearance as a weapon.

EXAMPLES OF SPECIFIC QUESTIONABLE SECURITY CLEARANCE DENIAL/REVOCATION PROCEEDINGS[19]

- A DIA employee lost his security clearance for misusing his Government credit card for personal reasons due to some financial problems. This 20+ year experienced veteran had no prior infractions in his personnel history and initially faced termination from his position through the normal disciplinary process. That personnel action was deemed to have been mitigated and he was instead punished with a 45 day unpaid suspension, which in and of itself was a very harsh penalty for this particular offense. The misuse of the credit card never cost the Government one penny as the employee always paid off the card when the debt was due. On the day the employee's suspension was to have ended, DIA's security office, which had known from the beginning of the personnel proceedings, suspended his access, prevented his return from his unpaid status, and moved to revoke his clearance. This action was nothing less than vindictive and retaliatory as DIA security officials, based on my experience with this Agency and conversations with employees with personal knowledge, was particularly incensed that the employee was not terminated for it their view that the individual had lied to a security officer. This employee has been without employment for years due to DIA's revocation of his clearance.

- An Air Force civilian employee and reserve officer had her TS clearance suspended for nearly one year (most of which was spent in unpaid status) after an ex-boyfriend filed at best exaggerated claims, and at worst false claims, of stalking against her. It became poignantly clear that a civilian supervisor who disliked her then used these allegations against her for his own purposes. Allegations of improperly using her Government computer to send three e-mails were also cited (coincidentally senior officials of this very office routinely communicated with me on personal matters). Though the TS clearance was eventually restored, the Air Force then instituted proceedings to revoke her SAP access which prevented her from returning to her old position. She finally quit her civilian Air Force position and obtained employment at another federal agency.

- An Army civilian faced revocation and had his clearance suspended over allegations that dated back a decade that touched upon Whistleblower activities and complaints filed with Members of Congress. He was the only source for the information and the Army chose not to undertake any independent investigation of its own to confirm or refute the allegations. Though his supervisors provided letters of support literally pleading that he be permitted to work on unclassified projects during the tenure of the suspension given the existing workload, the Army refused to do so and instead intentionally chose to impose financial hardships on the individual. One year later his clearance was restored. The individual quit his Army position in protest of his treatment immediately afterward.

- An Air Force OSI contractor had his clearance suspended in the wake of 9/11 when his employer filed false allegations against him. Given the fact the contractor was of Middle Eastern origin and the climate at the time, he was perceived as Muslim and treated as a potential terrorist. He is, however, a Lebanese Christian who had fought with the Israelis

[19] In each of these described circumstances I served as the attorney of record for the individual. I can provide additional information, to include the identification of and contact information for the individual, for further use by the Subcommittee.

and our cover forces during the Lebanese Civil War in the early 1980s. He has never been provided access to the substantive allegations against him. To this day agencies of the U.S. Government refuse to grant him a security clearance though they routinely seek to utilize his expertise on short-term projects in cleared and dangerous environments when it suits their interests. This has included protecting former U.S. Iraqi Civilian Administrator Paul Bremer in the initial months of the war.

- You will also hear today from my client, DIA employee Anthony Shaffer. While revocation proceedings against Mr. Shaffer appear to have been initiated for vindictive purposes by certain DIA officials, the ultimate adverse security clearance determination by the DIA appears genuinely motivated by his Whistleblowing activities involving ABLE DANGER.

- A veteran DIA Intelligence Officer had his clearance revoked amidst a variety of allegations that appeared retaliatory due to his Cuban nationality. This occurred in the wake of the DIA Cuban espionage scandal. When the allegations were challenged on appeal DIA substantively modified the information to justify its decision.[20] Moreover, it was made clear to me from an inside source that perceived conduct that fell outside of the issued Statement of Reasons, which is to serve as the sole basis for the personnel decision, was being used for adjudication purposes.

- An individual though cleared at the TS/SCI level through other agencies, has yet – despite the passage of three years and numerous inquiries - had a decision issued by the DOE as to whether his clearance will be granted or denied. As a result this individual has been unable to handle DOE information which his position would normally require.

- A DIA employee was suspended and faced revocation of his security clearance primarily for internally faxing his resume to another DIA office without having it formally cleared for release. Although a supervisor had tacitly approved the transmission, and it was well known that few DIA employees ever had their resumes "cleared", the employee was alleged to have committed numerous security violations with his unauthorized disclosure of classified information. He was also alleged to have displayed his DoD badge outside of the work compound. I was provided access to both the redacted unclassified versions and unredacted classified versions of the multiple copies of this individual's resume that had been seized off of his computer. Upon comparison the DIA security officials' determinations as to which portions constituted classified information was as varied as the spots on a leopard. Information classified on version #1 of the resume could be found unclassified on version #5 and so on. This employee's clearance was ultimately restored.

- One DoD contractor, who represented himself in appeal proceedings, lost his security clearance with the NSA because he admitted he *possibly* viewed child pornography on his home computer while searching for non-pornographic information. Disgusted by what he saw he reported the site to law enforcement authorities. Months later he returned to the site to see if action had been taken but discovered that the images still existed. He reported the site yet again. He returned a third time and confirmed that the images were finally gone. The NSA polygrapher described the contractor's conduct in returning to the website as an "unexplained curiosity"; a subjective and inappropriate assessment that

[20] For example, one allegation was that the Officer had committed an unauthorized disclosure of classified information to foreign nationals. After the appeal the allegation was modified, without any indication of the justification or evidence, that the unauthorized disclosure involved assets, a far more sensitive allegation and one which had no evidentiary basis in the existing record.

unequivocally contributed to NSA's adverse action. When DoD was informed of the adverse decision DOHA initiated revocation proceedings as well based solely on the NSA information. During the DOHA proceedings, which I handled, NSA refused to identify the polygrapher or disclose additional information. After hearing detailed testimony from live witnesses, as well as information concerning the fallacies of the NSA investigation, the DOHA Administrative Judge completely rejected NSA's substantive findings and dismissed the revocation proceedings. The Government did not appeal.

Agency Efforts To Use Security Clearances As Weapons Against Attorneys And The Games Surrounding "Need-to-Know" Determinations

I would be remiss if I did not also address the manner in which security clearances are used as weapons against attorneys representing federal employees, particularly within the Intelligence Community. On this topic I will focus specifically upon the CIA and DIA for those are the two agencies with which I have the most experience. On many occasions I am retained to represent covert operatives who work for the CIA/DIA. The mere fact of their relationship with the federal government requires access to classified information. As a result for the last decade I have been routinely and regularly granted authorized access to classified information, predominantly at the SECRET level.

In the usual case in order for attorneys to obtain access to classified information an agency merely runs a National Agency Check (NAC) to determine whether any criminal record exists or derogatory information is held regarding the attorney by another agency. It is rare that either a background investigation is conducted or that a SF-86 is required to be filled out and submitted, both of which are common place in the usual arena of security clearances.

Both DIA/CIA argue that outside attorneys are not accorded "security clearances". Instead they argue, particularly the CIA, that the attorney has nothing beyond a "limited security access approval"; a term that does not exist anywhere. In effect, this case-by-case determination is the equivalent of an interim SECRET level clearance. Sometimes the execution of a non-disclosure, secrecy agreement is requested, but this requirement varies from time to time.

What eventually does occur is that once any "clearance" or "access" is granted the attorney is subject to the control of the agency, and the CIA in particular attempts to use that access as a weapon against the attorney at every given opportunity. For example, the CIA asserts that it is the entity that determines when a "need to know" exists. Yet Section 2.5 of Executive Order 12968 states that "[i]t is the responsibility of *employees* who are authorized holders of classified information to verify that a prospective recipient's eligibility for access has been granted by an authorized agency official and to ensure that a need-to-know exists prior to allowing such access, and to challenge requests for access that do not appear well-founded," federal agencies, particularly within the Intelligence Community, regularly assert that their employees are not permitted to reach such decisions when it involves access to their retained counsel even when that attorney has been authorized to receive classified information in that case. Indeed, in such situations the agencies, especially the CIA and DIA, have threatened their employees with termination and prosecution, as well as retaliation against counsel themselves, if disclosure of relevant information – which the Government considers classified – is provided to counsel. That is, the agencies in question deliberately attempt to limit the amount of "classified" information that an attorney is authorized to hear or review in order to minimize the ability of an employee to properly defend himself against agency action.

For example, in Sterling v. Tenet et al.[21], a state secrets case which involved a racial discrimination claim brought by an Operations Officers against the CIA, the CIA properly declassified an EEO administrative file that was provided to Sterling's counsel. On the eve of the due date of Sterling's Opposition brief, the CIA suddenly claimed that the EEO file, which had been released two years prior, contained classified information. The CIA contacted me and threatened that if I did not return the documents, without being provided any opportunity to challenge this new convenient determination, I would have my "security clearance" or access revoked.[22] My co-counsel who had arbitrarily and for no reason had not been permitted classified access during the litigation was threatened with criminal prosecution for possessing "defense information" if he refused to return the EEO file. Needless to say, both of us reluctantly capitulated to the CIA's intimidation tactics.

In my professional opinion, and this topic should itself be the subject of Congressional hearings, this deliberate interference with counsel violates both administrative and Constitutional rights. With respect to counsel's access to classified information, at least one district court judge has agreed with the proposition.[23]

PROPOSED RECOMMENDATIONS FOR LEGISLATIVE CHANGE OR ACTION

After having spent years handling security clearance cases and litigating national security matters, it is beyond question that only the Legislative Branch of our Government can step in to protect those who would suffer abuse and retaliation that targeted their clearances. The Judicial Branch has openly demonstrated its adamant unwillingness to do so, and the Executive Branch has exploited that weakness whenever possible. In light of my own experiences, and in the canvassing of colleagues who also routinely handle such cases, my recommendations, in no meaningful order, are as follows:

- Task GAO with conducting a thorough assessment of the security clearance appeal process as it is implemented throughout the federal government. Standardization should be the norm throughout the federal system. There is simply no justifiable reason why one agency should be applying a different level of due process, procedural or substantive, than another.

- Create an independent body outside of the involved federal agency (most Offices of Inspector General believe they do not have jurisdiction to entertain challenges or reviews, nor does the Merit Systems Protection Board) to adjudicate final challenges to an unfavorable security clearance decision; OR

- Grant the federal judiciary statutory jurisdiction to review substantive security clearance determinations. While agencies always argue, and federal judges generally seem willing to accept, that such decisions require expertise lacking in the federal judiciary, the fact of the matter is that the majority of the decisions are based solely on common sense rationale. The granting of jurisdiction does not require that agencies no longer be accorded deference to their decisions. Yet Article I Administrative Judges, many of whom have little to no security clearance experience before being hired, substantively adjudicate

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[21] 416 F.3d 338 (4th Cir. 2005), cert. denied, __ U.S. __ (2006).

[22] My co-counsel at the time, who did not possess a "security clearance", was threatened with criminal prosecution.

[23] Stillman v. Department of Defense et al., 209 F.Supp.2d 185 (2002), rev'd on other grounds, Stillman v. Central Intelligence Agency et al., 319 F.3d 546 (D.C.Cir. 2003).

DOHA and DOE cases and reverse DoD and DOE security decisions, respectively on a daily basis. How is it then that an Article III Judge, who is not even required to undergo a background investigation and is permitted automatic access to classified information by virtue of their Constitutional authority, cannot adjudicate a clearance challenge? Presumably DOHA and DOE Administrative Judges participate in certain trainings before assuming their initial responsibilities so there is obviously no good reason why Article III judges can not do the same.

- Require all federal agencies to audiotape security interviews and, most importantly, polygraph sessions and maintain preservation of those tapes for a reasonable period of time as well as permit unfettered access to at least a written transcript if a security clearance denial/revocation proceeding is initiated. Very often clearance decisions come down to a "did he or did he not say" what is alleged, or in what context was the statement made.

- Legislate additional protections into the system to include, but not be limited to, the release of further information and the ability of counsel/petitioners to have access to classified information.

- Remove immunity from civil liability from individuals who submit information that they should know or is known to be false to a federal agency that leads to the initiation of adverse clearance proceedings to include a suspension.

- Legislatively forbid agencies from suspending employees without pay during the pendency of their security clearance proceedings, or at least require agencies to provide back pay to those who favorably resolve their case.

- Legislatively require that agencies cover attorneys fees for those cases in which the adverse decision is reversed.

- Create a system of penalties for those federal officials who knowingly and intentionally retaliate against individuals for Whistleblower or other activities/conduct which then leads to the initiation of adverse security clearance proceedings. Section 6.4 of Executive Order 12968 states that "[e]mployees shall be subject to appropriate sanctions if they knowingly and willfully grant eligibility for, or allow access to, classified information in violation of this order or its implementing regulations. Sanctions may include reprimand, suspension without pay, removal, and other actions in accordance with applicable law and agency regulations." Yet absolutely no sanctions, or even the perceived threat of such, exist for those who abuse the system for purposes of harming others.

These are but just some examples that I would hope you consider. Again, I thank you for the opportunity to appear before this august body today. I am more than willing to answer any questions you might have, as well as work with Members of this Subcommittee and its staff to best design the legislative actions I have suggested today.

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19 October 2005

VIA FACSIMILE AND MAIL

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Washington, D.C. 20340
ATTN: CLAR, DAC-3B/DPT

Subj: Response to the 20 Sep 2005 Final Revocation of Eligibility for Access to Sensitive Compartmented Information Regarding Anthony Shaffer

Dear Mr. President:

My client, Anthony Shaffer, through the undersigned counsel, respectfully submits this appeal of the decision of the Defense Intelligence Agency ("DIA") to revoke his security clearance based on the allegations set forth in the 30 June 2004 Statement of Reasons and subsequent concerns that were raised as a result of Mr. Shaffer's submitted written response. We understand that the SAB will consider not only what is written below but will carefully review and consider all previously submitted documents.

As no doubt the Board is aware, Mr. Shaffer's case has become the subject of a high-degree of public attention due to the controversy surrounding the activities of a Department of Defense/Army operation entitled "Able Danger" in which he participated. Because of this controversy the relationship between Mr. Shaffer and DIA/DAC has very clearly become strained to say the least. That DAC's decision with respect to Mr. Shaffer's clearance is not, on some level, connected to these tensions would seem to be naïve, particularly given the uncontroverted evidence that was submitted on Mr. Shaffer's behalf which was merely rebuffed or ignored with apparently little to no substantive consideration.

Let me say at the outset that both Mr. Shaffer and I flatly and unequivocally deny any allegation or insinuation that false statements or documents were submitted to DIA as part of this clearance process. I personally find such a conclusion to be not only absurd and insulting, but lacking of the application of any common sense determination that is allegedly used to guide security clearance decisions under the requisite regulations that govern this process.

Quite frankly, it is our belief that a reasonable person could conclude based on the available evidence that it was, in fact, Mr. Karl C. Glasbrenner's determination letter, that contains knowingly false statements. This is discussed further below.

The issues surrounding DIA's decisions to revoke Mr. Shaffer's clearances have, in fact, been reported to the Department of Defense's Office of Inspector General ("DoD OIG"). Particularly of interest to the DoD OIG is the fact that privacy protected information concerning this clearance matter was leaked to members of the media by unknown individual(s) within the Department of Defense. While we have no specific evidence that DIA officials were responsible for this unlawful action, there is no evidence to sustain a conclusion they were not. It is our understanding that the matter is or will shortly be the subject of a formal DoD OIG investigation. Additionally, the issue of Mr. Shaffer's clearance is also being reviewed by several congressional committees.

It seems clear from the personal appearance and the letter from Mr. Glasbrenner that an undercurrent exists with respect to certain issues. Quite frankly, we remain confident that the original and supplemental submissions that we provided to DIA more than amply addresses each and every concern, individually and collectively. Nevertheless, let me highlight some specific issues.

- The conclusion that Mr. Shaffer "knowingly made false statements" by asserting that he was "fully cleared of wrongdoing" and "I was cleared by the Army" is nonsensical. Mr. Shaffer fully believed, and still believes, these statements to be true. The proof, as they say, is in the pudding. The Army was provided with full access to the DIA OIG investigative report concerning Mr. Shaffer that served as the basis for the primary derogatory allegations against him. With that information in hand, and knowing that the more significant alleged infractions occurred while Mr. Shaffer was actually Major Shaffer conducting operations on active duty, and with knowledge that the DIA was pursuing these revocation proceedings against Mr. Shaffer, the Army's official and only formal reaction was to *promote Maj Shaffer to Ltc Shaffer*. Such action cannot be construed in any other manner as other than a slap in DIA's face and a complete disregard to the alleged findings proffered by DIA against Mr. Shaffer.

  Any reasonable person, particularly a layperson, would view the Army's action as having "cleared" him of any wrongdoing. This is nothing more than the use of semantics. What would have been the difference had Mr. Shaffer couched his phraseology with "I believe the Army has fully cleared me of wrongdoing", or "It is my perception I was cleared by the Army". There is no fundamental difference in the message Mr. Shaffer was attempting to convey. A rational subjective assertion by Mr. Shaffer is being intentionally twisted by DAC to impute a willful intent on Mr. Shaffer's part to be dishonest. Frankly, we find that action to be itself dishonest.

- Equally dishonest is DAC's continued reliance on an alleged General Officer Memorandum of Reprimand, 30 June 2004, by Major General Galen B. Jackman, U.S. Army, Military District of Washington. This document simply does not exist. To our knowledge no record of it can be found within any military file system maintained on Ltc

Shaffer. It was never properly issued. It was never formally processed through appropriate channels. According to the U.S. Army, the proposed personnel action does not exist. The Army's Personnel Center in St. Louis has confirmed this multiple times including, I understand, directly to DIA.

Had the GOMAR actually existed, DIA knows full well that Ltc Shaffer would clearly still be Maj Shaffer. That a copy of this document is within DIA's security files as part of this processing is completely irrelevant. It has absolutely no substantive standing, and it is nothing less than unethical that DAC continues to utilize this document, which solely regurgitates the same allegations from the DIA OIG report that were substantively refuted by us, against Mr. Shaffer.

- DIA accused Mr. Shaffer of circumventing his chain of command. Yet Mr. Shaffer submitted a letter from the very Major General who served as the Director of Intelligence Operations for DIA he was alleged to have improperly briefed who unequivocally stated he personally instructed Mr. Shaffer to act as he did. See Memorandum for the Record of Major General Robert Harding (dated 8 Jun 2005). Therein Major General Harding specifically states that "At my guidance and direction, he did keep me fully informed both during the week and on weekends. He was accountable to me on specific Special Access Programs that only he and a handful of my principal staff were permitted access." Yet DAC determined that Mr. Shaffer failed to mitigate this allegation. That is simply fundamentally illogical.

- Mr. Shaffer was accused by DIA of obtaining a Defense Meritorious Service Medal under some never-explained false pretenses. Yet Mr. Shaffer submitted a letter from his military and civilian senior rater who categorically exclaimed that Mr. Shaffer fully deserved the Medal for his actions, and that the individuals who purported otherwise had no knowledge of the highly classified matters Mr. Shaffer was engaged in that led to the award. See Official Statement of Colonel (ret) Gerry York (dated 8 Jun 2005). Col York specifically wrote that "Due to security, many of the Joint Special Operations Command (JSOC), Special Operations Command, Central Command and direct support to the FBI, he was not permitted to notify or update the DO/DHS Joint Reserve Unit (JRU) leadership of his specific activities. The leadership of the JRU did not then, and do not now, have the need to know any information about the sensitive tasking and support that MAJ Shaffer, under my oversight, provided to the commands and elements listed above. Therefore, they cannot judge with any accuracy, without knowledge of the 'compartmented' information, MAJ Shaffer's worthiness for the award." Yet once again though presented with first-hand rebuttal evidence that contradicted allegations supplied by those with no personal knowledge of the relevant events, DAC determined that Mr. Shaffer failed to mitigate the allegations. Such a decision is inexplicable.

- DIA dredges up numerous ancient allegations and concerns regarding Mr. Shaffer, all of which had been exhaustively investigated through prior background investigations which led to the granting on each occasion of Mr. Shaffer's access to TS/SCI and higher information. I have attached for the record a copy of Mr. Shaffer's Certificate of

Clearance and/or Security Determination that adjudicated the pre-October 1995 issues at Exhibit "1".

Please note that in addition to the materials previously submitted and the additional arguments espoused above, I also submit for your consideration as Exhibit "2" a letter recently submitted to the Secretary of Defense by Congressman Curt Weldon regarding Mr. Shaffer and the security clearance proceedings.

We trust that the SAB will carefully review the evidence with an unbiased eye toward reaching a common sense determination, and look forward to its decision.

Sincerely,

/s/

Mark S. Zaid

Enclosures
cc: Department of Defense Office of Inspector General
Senator Arlen Specter
Congressman Tom Davis
Congressman Curt Weldon
Anthony Shaffer

Strategic Security Solutions

Harding Security Associates, LLC
7918 Jones Branch Drive
Suite 530
McLean, Virginia 22102

8 Jun 2005

Memorandum for the Record

I, Robert Harding, was the Director for Intelligence Operations (DO) for DIA, Defense HUMINT Service, from 1997 through 2000. MAJ/Mr Shaffer ran my Information Operations program over this period with distinction.

This memorandum is to address two allegations about Mr Shaffer during the time I was the DO:

1) He failed to properly safeguard classified information during a briefing in October 1997. DAC made me aware of this issue. After review of all the facts, it was my judgment that Mr Shaffer was not guilty of this charge. Mr. Shaffer was not "read-on" to the program in question. It appeared to me, at the time, that this was an important factor in assessing deliberate compromise of classified information. To my knowledge, Mr Shaffer properly safeguarded all classified information he was responsible for during the entire period he worked for me.

2) Despite receiving warnings, he continued to circumvent the supervisory chain of review and provided briefings to the Director of Intelligence Operations on the weekends (Saturday and Sunday), during an unspecified period of time. I had an "open door" policy. Any member of the organization could discuss with me any issues of concern, at any time. In the case of Mr. Shaffer, he ran a number of highly sensitive operations – both in his reserve and civilian capacity. At my guidance and direction, he did keep me fully informed both during the week and on weekends. He was accountable to me on specific Special Access Programs that only he and a handful of my principal staff were permitted access.

Mr. Shaffer performed with extraordinary devotion to duty. He handled, and protected, some of the most sensitive operations the Department of Defense has ever conducted. I firmly believe that he is both trustworthy and responsible.

MG Robert Harding USA (Retired)

From Anthony Shaffer [redacted]
Sent Wednesday, September 1, 2004 11:51 am
To MAJ Paulette Burton <paulette.burton@us.army.mil>
Cc John Powell [redacted] , Jim Rutledge <jim.rutledge1@us.army.mil>
Bcc
Subject Fw: Reprimand

Paulette -

I will be taking a copy of this to the MDW IG and the DoD IG.

Based on our discussions and your guidance, I have never signed anything to accept "receipt" of the action - so I am not sure how he (CPT Anglin) can get away with this.

What should I do next, if anything?

Thanks in advance!

V/R
Tony Shaffer
----- Original Message -----
From: Anglin, David O CPT JFHQ-NCR SJA, MDW/SJA
To: 'Tony Shaffer'
Cc: Burton, Paulette MAJ MDW
Sent: Wednesday, September 01, 2004 11:24 AM
Subject: RE: Reprimand

On 1 September 2004, the Commander, U.S. Army Military District of Washington, directed Official Military Personnel File (OMPF) filing for the reprimand issued by him to MAJ Anthony A. Shaffer.

DAVID O. ANGLIN
CPT, JA
Chief, Military Justice
Military District of Washington
Office: (202) 685-4581
Fax: (202) 685-2802
DSN: 325

-----Original Message-----
From: Tony Shaffer [redacted]
Sent: Monday, August 16, 2004 4:45 PM
To: Burton, Paulette MAJ MDW
Cc: Harris, Victor CPT FMMC; 'John R Powell '; 'Jim Rutledge '; Anglin, David O CPT JFHQ-NCR SJA, MDW/SJA
Subject: Re: Reprimand

MAJ Burton - thank you for all the assistance.

I spoke w/ Mr. Rutledge this morning, and per that conversation, I am to await guidance from HRC St Louis (my chain of command) in regard to the reprimand issue, and instructed to take no action unless directed by them.

It was Mr. Rutledge's understanding, too, that upon departure from active duty on 1 Jun 2004, **commander MDW, the** legal authority referenced by CPT Anglin, had NOT announced any intent to take

any action regarding the allegations (CPT Harris - was involved in this issue due to the flag having been placed on, and removed from, my files) prior to my departure from his command. To date, my current chain of command has NOT been contacted on this issue via official channels. The 30 Jun 2004 date of the GOMOR reflects the "after the fact" nature of this action.

Therefore, until and unless I am instructed by proper military authority, from my chain of command, to "take service" of the reprimand, I will not. And I suspect the commander HRC St Louis will not support MDW JAG's attempt to circumvent his authority and the letter and spirit of AR 600-37.

AR 600-37 is clear on this issue, so unless I provide a written statement waiving my right to review the documents, I must be afforded the opportunity to review the supporting documents - I very much look forward to the opportunity to review and refit the information - but only when legally authorized to do so by my current chain of command. I believe this is in line with what happens to active duty members of the Army - the chain of command is involved - this is my understanding from previous discussions w/ you and with CPT Harris.

I am, in my current status, a civilian, and must be put on orders of some sort even to deal with "admin" issues - re: when we are "directed" to get physicals, we are put on orders - we simply don't "show up" at an Army Hospital and get a physical - it is done via the chain of command. Commander, MDW and the MDW JAG had more than 60 days, prior to my departure from active duty, to do "something" but chose to do nothing. There was no intent stated by anyone to take any action until well past my departure from Active Duty, and assignment to HRC St Louis.

I have asked Army's MDW IG to open an inquiry as to CPT Anglin's false assertion that he has a receipt from me for a 6 August 2004 package - I did not receive any package, so this can only be construed as a "false official statement" by CPT Anglin, which is a violation of the UCMJ.

V/R
Tony Shaffer

----- Original Message -----
From: Burton, Paulette MAJ MDW
To: Anglin, David O CPT JFHQ-NCR SJA, MDW/SJA
Cc: Harris, Victor CPT FMMC ; 'John R Powell ' ; "Tony Shaffer' ' ; 'Jim Rutledge '
Sent: Monday, August 16, 2004 2:37 PM
Subject: RE: Reprimand

ALCON

As a Defense Counsel it is my duty to represent soldiers accused of violations under the UCMJ. Administrative actions such as a GOMOR are considered Priority III and can be handled by Legal Assistance. I have tried to assist in resolving this matter. The only assistance I can truly offer is the assistance of writing a rebuttal to the GOMOR if that assistance is requested. How the letter is issued is a matter to be resolved by the Command after legal advice. Once the GOMOR is issued I may be able to provide assistance with the rebuttal or in the alternative assistance can be sought from legal assistance.

-----Original Message-----
From: Anglin, David O CPT JFHQ-NCR SJA, MDW/SJA
To: Burton, Paulette MAJ MDW
Cc: Harris, Victor CPT FMMC; John R Powell; 'Tony Shaffer'; Jim Rutledge
Sent: 8/13/04 3:26 PM
Subject: RE: Reprimand

MAJ Burton

I have consulted the Military Personnel Branch of Administrative Law Division, Office of the Judge Advocate General, concerning our service. They found no requirement that a reservist be in an active duty status in order to be served with this administrative matter.

We have received a postal receipt indicating that MAJ Shaffer received the packet on 6 August 2004, and his email indicates that while he objects to the manner in which he has been served, he has in fact, received the entire packet, and has commented on its sufficiency.

Contrary to MAJ Shaffer's assertion, no one has refused to forward his action to his gaining command. According to AR 600-37, para 3-4(d)(1):

(When a soldier leaves the chain of command or supervision after a commander or supervisor has announced the intent to impose a reprimand, but before the reprimand has been imposed, the action may be processed to completion by the losing command. When completed, the letter will be forwarded to the gaining commander with a recommendation for filing. The final filing determination will be made by the individual's current (gaining) commander.

I would also add that as a general officer, the commander, MDW, also has inherent authority to file a GOMOR, but no decision will be made until after MAJ Shaffer's opportunity to rebut expires.

The 10-day period designated for MAJ Shaffer to submit his rebuttal matters expires on Monday, after which we will take the matter to the commanding general at the next available appointment. If MAJ Shaffer wants additional time to submit his rebuttal please contact me immediately, otherwise, the duty day ends at 1630 hrs on Monday.

DAVID O. ANGLIN
CPT, JA
Chief, Military Justice
Military District of Washington
Office: (202) 685-4581
Fax: (202) 685-2802
DSN: 325

-----Original Message-----
From: Tony Shaffer [redacted]
Sent: Wednesday, August 11, 2004 6:31 PM
To: Jim Rutledge
Cc: Harris, Victor CPT FMMC; Burton, Paulette MAJ MDW; Anglin, David O CPT JFHQ-NCR SJA, MDW/SJA; John R Powell
Subject: Re: Reprimand

Jim -

Per our conversation earlier this week, I'm sending this to you FYI as promised. I am sorry that this has drug out now, going on three months AFTER I've left active duty.

This is additional information to that I've already provided you and HRC St Louis on this issue. I must stay I am disappointed in the failure to move this issue forward by MDW JAG in a proper, timely manner that is stipulated by the regulation.

While CPT Anglin's comment below regarding my desire to have this resolved as quickly as possible is accurate, I will not violate Army regulations on this, or allow him to violate Army regulations on this issue. By my count, he or his office have attempted three times now to forward the subject reprimand in an illegal manner - first in an attempt to serve it on me directly, on 6 July 2004 (more than 30 days after I left active duty - after having had 60 days to take action on this issue prior to my departure from Active Duty), the second attempt noted below, and the third by attempting send the issue via the us Postal System.

I have noted each incidence and referred these violations of Army regulations to proper Army and DoD oversight authorities.

Further, to the best of my knowledge, the information the Army MDW JAG is using on this issue is, by the standards of AR 600-7, para 3-2, is not complete as persons who I identified to the DIA IG investigator were never contacted, therefore exculpatory information was apparently not included in the DIA IG investigation. I know this because I contacted these persons directly and they confirmed that they were never contacted by the DIA IG investigator. I am confused as to why Army JAG would be so willing to move forward with trying to impose some negative action with incomplete information.

Effective 1 Jun 2004, as you are aware, I was assigned back to you and HRC St Louis. I have been awaiting some official word on how you all, as my higher HQs, wish me to deal with this issue. Apparently, based on our conversation, it is because the MDW JAG has refused to forward the issue to HRC for your action.

In our last conversation on Monday of this week, it is my understanding that you as my PMO and, to your knowledge, the HRC St Louis JAG had not been contacted on this issue. This both concerns and confuses me since it is my understanding that according to AR 600-37 (attached), I must be in some official "military status" to be 'served" with the issue so that I may have time to respond to the allegation, and if this is not possible, this issue is supposed to be forwarded to you all for action since I am not under MDW's jurisdiction. According to Para 3-2, I am due the chance to review and refute the allegations and according to Para 3-4, it should be forwarded to HRC St Louis for your action (in this case, both the "due process" review and chance to refute as well as filing determination).

Per our conversation, I remain willing to be recalled to active duty or to have "man-days" or weekend drills set up to deal with this issue, in military status. CPT Harris, as HHC Ft. Meyer, would be able and willing to work out some accommodation on this - I have info'ed him on this again. I'm sure I could deal with this in "drilling" status, having CPT Harris sign off on my forms to account for the time.

This information is provided FYI to keep you in the loop and so that in the event that MDW JAG chooses to move this issue forward.

Pls let me know if and when you are contacted by the HRC St Louis or MDW JAG on this issue so we can resolve it as quickly as possible, within Army regulations and procedure.

V/R

ANTHONY A. SHAFFER
MAJ (P), GS, USAR

----- Original Message -----
From: Anglin, David O CPT JFHQ-NCR SJA,
<mailto:David.Anglin@fmmc.army.mil> MDW/SJA
To: Burton, Paulette MAJ MDW <mailto:Paulette.Burton@fmmc.army.mil>
Cc: 'Tony Shaffer' <[redacted]
Sent: Wednesday, August 04, 2004 2:40 PM
Subject: RE: Reprimand

MAJ Burton,

Thank you for your prompt response.

CPT Anglin

-----Original Message-----
From: Burton, Paulette MAJ MDW
Sent: Wednesday, August 04, 2004 2:38 PM
To: Anglin, David O CPT JFHQ-NCR SJA, MDW/SJA
Cc: 'Tony Shaffer'
Subject: RE: Reprimand

CPT Anglin,

I did send you an email from my AKO account reference this matter and I will resend it to you. I do not have MAJ Shaffer's home address and he will not authorize me to release to you. I am NOT accepting service on behalf of my client because he does not consent to such service.

-----Original Message-----
From: Anglin, David O CPT JFHQ-NCR SJA, MDW/SJA
Sent: Wednesday, August 04, 2004 2:16 PM
To: Burton, Paulette MAJ MDW
Cc: 'Tony Shaffer'
Subject: Reprimand

THE FOLLOWING ELECTRONIC MAIL INCLUDES SENSITIVE INFORMATION.

MAJ Burton,

My efforts to obtain an address for Major Shaffer have unsuccessful, and I have not found anyone willing to place him on orders to take receipt of a packet. In the interim, this action has dragged on with no movement towards a final resolution.

To prevent further needless delay, and in keeping with MAJ Shaffer's desire to move as rapidly as possible, I have attached the commanding general's action as a word document.

Per our conversation on Monday, you were to check with MAJ Shaffer and find whether you could disclose his address so that we could mail him the entire packet associated with the GOMOR. I have received no response, so I will forward the packet to your office so that MAJ Shaffer can still access the documents and prepare his rebuttal, even if he would prefer we not have his home address.

If you or MAJ Shaffer would prefer that we send the packet to him directly, please notify me.

v/r

DAVID O. ANGLIN
CPT, JA
Chief, Military Justice
Military District of Washington
Office: (202) 685-4581
Fax: (202) 685-2802
DSN: 325

-----Original Message-----
From: Tony Shaffer [redacted]
Sent: Wednesday, July 07, 2004 9:40 PM
To: Anglin, David O CPT MDW
Cc: Harris, Victor CPT FMMC; Jim Rutledge
Subject: Fw: POC Information

CPT Anglin, per conversation w/ MAJ Woody this morning at o/a 1000 hrs, I am providing you the POC information you will need to request my return to active duty to move forward with the GOMOR issue. I was provided with deactivation orders on 15 Jun 04, with a DD-214. I am now assigned to HRC St Louis.

I very much want this issue resolved as rapidly as possible -however, I must say I am a bit confused here about the whole issue.

I last heard from MAJ Arnold on this issue in an e-mail this past week - she said the GOMOR was signed on Wednesday last week and she still did

not know what was in it, nor any information regarding the specific reason your office chose to move forward on this at this late date - it was her opinion that this course of action, i.e. waiting until a member is off of active duty to move forward with this sort of action is unusual.

Previously, MAJ Arnold was told by MAJ Woody on the 2nd of Jun 04, there was no plan to take 'any action' by your office on this issue and MAJ Arnold forwarded this information to me on the 2nd of Jun as well. I understand that MAJ Arnold is still in the area, though she has PCS'ed from her TDS position - so I'm sure you can still contact her if need be to discuss this issue.

It is remarkable that your office had 60 days to take action on this issue - roughly from 1 Apr 04 through 1 Jun 04, and did not take any action at that time - had action been taken on a timely basis, there would be no need to seek my return to duty at this point in time.

Therefore, please be aware that the MDW IG Assistance Division Chief, COL Lanzendorf, has been notified of my concerns regarding the circumstance of this GOMOR. He has asked that I bring a copy of the GOMOR to him when I receive it. I have requested an formal inquiry by the Army IG into the circumstance of the issuance of this GOMOR due to perception and comments by some Army personnel who have been involved in this process, that DIA put direct and undue pressure on your office. I do have direct knowledge that DIA's lawyer, Mr. Bud Meyer did admit to me that they were "putting pressure" on you all, even after I had left active duty, and have passed this info to the IG.

You can contact Mr. Jim Rutledge - I have provided you his e-mail address on this note as well. I have spoken to Mr. Rutledge - he is the representative of my current commander - who is the commander of HRC St Louis. You can provide the background and justification to Mr. Rutledge to see if funding can be found to deal with this administrative action. His number is (314) 592-0000, extension 2016. Please note that Mr. Rutledge controls all reserve issues and my records directly due to security requirements.

I have spoken w/ CPT Harris, and I believe it would be possible to place me with his company for administrative control (ADCON) during the time you request my recall to active duty or what ever arrangement you can work out with ARPERSCOM/HRC St Louis. I will expect to be contacted by St. Louis on this issue once you work out the details.

V/R
TONY SHAFFER
MAJ (P), USAR

AFFIDAVIT

1. MAJ Anthony Shaffer now LTC Anthony Shaffer sought my assistance in about July 2004 in reference to an investigation that he was the subject of.

2. He has authorized me to release information to Mr. Mark S. Zaid, Esquire; in reference to the assistance I provided him relating to this matter.

3. LTC Shaffer and I met on numerous occasions to discuss the allegations and the investigations against him.

4. My predecessor MAJ Elizabeth Sweetland (previously MAJ Arnold) advised me that a General Officer Memorandum of Reprimand (GOMOR) would be given to LTC Shaffer.

5. I discussed several issues with LTC Shaffer in reference to the GOMOR to include who has the authority to file a GOMOR, filing of the GOMOR in an official military personnel file (OMPF), filing the GOMOR in a local file, or no filing at all of the GOMOR. I also discussed with him the impact this could have on his career if the letter is filed in his OMPF and an officer separation board is convened. One of the biggest concerns was the fact that LTC Shaffer left active duty on 14 June 2004.

6. In early July, MAJ Shaffer provided CPT David Anglin (now MAJ Anglin), Chief of Justice at Fort McNair with a point of contact (POC) at Human Resource Command (HRC) to coordinate bringing LTC Shaffer back on active duty. The POC was Mr. Jim Rutledge. I don't know if MAJ Anglin ever contacted HRC.

7. MAJ Anglin begin contacting me to obtain a mailing address for LTC Shaffer. I advised MAJ Anglin that my client would not consent to me releasing his mailing address. MAJ Anglin then forwarded a copy of the GOMOR to me via email and advised that he would forward the packet to my office. I advised MAJ Anglin via email that LTC Shaffer will not authorize me to release his home address and that I would not be accepting service on behalf of my client because the client does not consent to such service.

8. I provided LTC Shaffer with a copy of the GOMOR that I had received via email. I never received a copy of the allied documents. I also advised LTC Shaffer that MAJ Anglin was seeking his mailing address and that eventually he would locate it. I further advised LTC Shaffer that in order for MAJ Anglin to successful serve him he would have to have proof of the service; therefore, LTC Shaffer would need to sign a confirmation stating he received the letter in order for MAJ Anglin to have proof that he was served. A couple of days later LTC Shaffer called me back to say that the post office had attempted to deliver something to his home that required a signature but only his son was home and his son did not sign the card. I don't recall the exact age of his son but I recall

that his son is younger than 16 years old. Again, I advised LTC Shaffer that if he did not accept service that they could not prove he ever received it.

9. LTC Shaffer continued to work with Jim Rutledge at HRC to come back on active duty.

10. On 13 August 2004, MAJ Anglin sent an email to me and various other people stating that he had consulted with the Military Personnel Branch of Administrative Law Division, Office of the Judge Advocate General and had been advised that there was "no requirement that a reservist be in an active duty status in order to be served with this administrative matter". In this same email, MAJ Anglin stated that "we have received a postal receipt indicating that MAJ Shaffer received the packet on 6 August 2004, and his email indicates that while he objects to the manner in which he has been served he has in fact received the entire packet, and has commented on its sufficiency". I never saw the email that MAJ Anglin is referencing nor did I see comments prepared by LTC Shaffer. MAJ Anglin further stated that the rebuttal was due at 1630 on Monday which would have been 16 August 2004.

11. At no time did LTC Shaffer advise me that he had received the GOMOR or the allied documents.

12. Out of frustration with the flurry of emails on the subject, I responded to MAJ Anglin and various other people on 16 August 2004 informing them that, "the only assistance I can truly offer is the assistance of writing a rebuttal to the GOMOR if that assistance is requested." I further stated, "Once the GOMOR is issued I may be able to provide assistance with the rebuttal or in the alternative assistance can be sought from legal assistance".

13. LTC Shaffer never sought my assistance in reference to the GOMOR. I never provided him any assistance in reference to the rebuttal for the GOMOR.

14. On 1 September 2004, I received an email from MAJ Anglin stating that the Commander, U.S. Army Military District of Washington, directed that the reprimand be filed in LTC Shaffer's OMPF. I advised LTC Shaffer of the filing decision.

15. LTC Shaffer advised me that he would be taking this issue to the Military District of Washington (MDW) Inspector General (IG) and Department of Defense IG.

16. I did not have any further contact with LTC Shaffer until he contacted me last week asking that I release this information to Mr. Zaid.

17. I have attached copies of emails in my possession.

PAULETTE V. BURTON
MAJ, JA
Senior Defense Counsel

SWORN TO AND SUBSCRIBED
Before me this 14th day of June 2005

In the County of Fairfax, State of Virginia

Mary C. Thomas
Notary
My commission expires on 31 July 2005

8 Jun 2005

Memorandum for Record

I conducted the Special Background Investigations (SBIs) regarding Anthony A. Shaffer, [redacted] from 1988 through the1995 timeframe.

I have reviewed the Defense Investigative Service (DSS) documents forwarded on 16 August 2004 by S.L. Demarco, DSS, to Mr. Shaffer. These documents include the completed, and, to my knowledge, favorably (to Mr. Shaffer) adjudicated investigations conducted by me.

I stand by my favorable investigative determinations of Mr. Shaffer.

I conducted an investigation to resolve AFIA allegations in 1990; the investigative conclusions reached were favorable to Mr. Shaffer. In my interview with LTC Rick Urban, Mr. Shaffer's supervisor at the time, it was indicated that there was an "appearance" of a vendetta by his former leadership at AFIA.
The investigative findings were also adjudicated favorably to Mr. Shaffer.

Annelise Clark

Ann Clark
Special Agent
Defense Security Service

8 Jun 2005

COL (ret) Gerry York Official Statement:

Background: MAJ/Mr. Shaffer has served in a multitude of leadership positions over the past 15 years. With my recommendation and nomination, LTG Pat Hughes, then Director of DIA, promoted him to GG-14 through the Exceptional Intelligence Professional (EIP) program in 1997 because of his outstanding efforts to establish a special mission unit that could support compartmented DoD information operations programs. I was his senior rater as a reservist and his reviewer as a civilian employee over the period 1997 to the beginning of 2001. During this time he was a model employee. While I had more than 500 personnel working for me during this period as chief of operations, I would have traded 300 of those folks if I could have had 200 like Tony Shaffer. He has managed, and protected, some of the most sensitive operations in Defense HUMINT – many of which are still on going.

Rebuttal of specific issues:

Undue Award Issue: He was due the Defense Meritorious Service Medal (DMSM) from his reserve duties. While I was his senior rater, from 1998 through 2000, he served with distinction, as the only O-4 (all others were O-5) reserve team leader of the CONUS Division (DHO-4). This service alone is justification for the DMSM. However, he went on to lead the Controlled HUMINT Support Group (CHSG), a team that he created and lead that worked directly for me. While chief of the CHSG he was a visionary who recognized the need to establish and maintain a cadre of reserve Case Officers, as well as provided tailored reserve support to Special Operations Command (SOCOM, Central Command (CENTCOM, Joint Special Operations Command (JSOC) and the Counter-terrorism component of the Federal Bureau of Investigation (FBI). He was provided written commendations from the Commander of JSOC, MG Brown, and RADM Stephens of SOCOM during this period that further justified the award.

Due to security, many of the Joint Special Operations Command (JSOC), Special Operations Command, Central Command and direct support to the FBI, he was not permitted to notify or update the DO/DHS Joint Reserve Unit (JRU) leadership of his specific activities. The leadership of the JRU did not then, and do not now, have the need to know any information about the sensitive tasking and support that MAJ Shaffer, under my oversight, provided to the commands and elements listed above. Therefore, they cannot judge with any accuracy, without knowledge of the "compartmented" information, MAJ Shaffer's worthiness for the award. This included a project nicknamed ABLE DANGER – a project in which he was assigned to a special task force by GEN Schoomaker – the then Commander of SOCOM, and is now the current Chief of Staff of the Army.

While working for me, under his reserve hat, his activities regarding counter-terrorism his activities were directly coordinated and integrated into Bob Willis DRAGON TOWER counter-terrorism efforts, therefore the IG claim that he, Mr. Willis, was not aware of MAJ Shaffer's achievements is untrue. Plus, MAJ Shaffer's efforts are well documented. His achievements are listed in his OERs for the period, and through the letters of commendation from MG Brown, commander of JSOC, RADM Stephens, SOCOM SOIO, and VADM Wilson, Director DIA, that were endorsed by MG Harding and myself and presented to MAJ Shaffer for his efforts.

Rebuttal of Verbal Reprimand. I was the Director of HUMINT Operations that is referred to in the 30 Jun 2004 Statement of Reasons (SOR). I do not give verbal reprimands. In regard to the allegation that I verbally reprimanded Mr. Shaffer regarding his conduct of a briefing in October of 1997; I never provided Mr. Shaffer any such admonishment. At no time did I "reprimand" Mr. Shaffer, nor was any "written" reprimand ever considered or prepared. His behavior and security sense was always outstanding. When DAC contacted me on this issue, I asked Mr. Shaffer for the background, which he provided. After hearing his input, I was confident that Mr. Shaffer's recollection of the incident was accurate, and that he did not compromise any security information, and informed DAC of my judgement. It is notable that Mr. Shaffer was accused of compromising a Special Access Program (SAP) to which he was not even read-in on, therefore making it legally and practically impossible to hold him accountable. One cannot be held accountable for information they do not know is considered "protected". Therefore the allegation that he compromised classified information is false, as is the claim that I "verbally reprimanded" him on the same issue.

Rebuttal of Supervisory Chain of Command Bypassing: MG Harding had an open door policy. Therefore, under MG Harding's command there was no way to single anyone out for "bypassing" the chain of command. Due to the special access and compartmented projects MAJ Shaffer and the CHSG handled for MG Harding, and me he was provided specific guidance to keep MG Harding, the Director of Intelligence Operations fully up to date and informed. This guidance and responsibility required that MAJ Shaffer provide information directly to MG Harding on weekends (Saturday and Sunday) during reserve weekends in his reserve hat. I was confident that MAJ Shaffer would provide a back briefing to me and the rest of the chain of command whenever he had direct contact with MG Harding. MG Harding encouraged direct contact and interaction with MAJ Shaffer due to the sensitive nature of the operations that MAJ Shaffer was managing. MAJ Shaffer would have been admonished had he not kept MG Harding full up to date and in the loop on a number of specific operations. Not everyone in the reserve or civilian chain of command were aware of these special access operations – therefore causing some level of resentment of DHS reserve and civilian leaders. It is this major factor for the perception that MAJ Shaffer bypassed the chain of command. However, the fact is MAJ Shaffer did

an extraordinary job of keeping the principal officers fully informed of his management of highly sensitive issues.

Closing: Mr/MAJ Shaffer is an outstanding intelligence officer who I had and have full confidence in his personal ethics, his security awareness and judgment. He would never intentionally engaged in wrongdoing of any sort. When he was in charge of an operation, I knew it would be lead in an honest and efficient manner.

GERALD YORK
COL (RET), MI
U.S. ARMY

DEFENSE INTELLIGENCE AGENCY
WASHINGTON, DC 20340

1 February 1999

THRU: DH-D

Dear Mr. Shaffer:

Extremely pleased to forward and endorse a letter of appreciation from Rear Admiral Thomas W. Steffens, Director, Intelligence and Information Operations Center, U.S. Special Operations Command. Your professional efforts on behalf of the Directorate for Operations reflect highly of you and are truly commendable.

Please accept my personal thanks for a job well done.

With best wishes,

1 Enclosure a/s

ROBERT A. HARDING
Brigadier General, USA
Director for Operations

Mr. Anthony A. Shaffer
Office of Operations
Defense HUMINT Service

UNITED STATES SPECIAL OPERATIONS COMMAND
7701 TAMPA POINT BLVD.
MACDILL AIR FORCE BASE, FLORIDA 33621-5323

SOIO 14 December 1998

Mr. Tony Shaffer
Defense Intelligence Agency
DO/DHM-1S
3100 Clarendon Boulevard
Arlington, VA 22201-5304

Dear Mr. Shaffer:

Thank you for your energetic review of the Defense HUMINT Service (DHS) Stratus Ivy initiative during my Directorate for Operations (DO) orientation visit to Clarendon on 27 October. The U.S. Special Operations Command and my Center are heavily focused on Information Operations (IO) and we must ensure our efforts are complementary.

The complexity of defining and applying IO presents a special challenge to cooperation between the Intelligence Community and operators, including Special Operations Forces (SOF). Our exchange enabled me to emphasize the criticality of presenting DHS IO capabilities in a clear, simple way that both enables and encourages SOF to understand and to task them.

Please accept my personal appreciation for helping to make my DO orientation an outstanding success. I look forward to testing our IO capabilities for mutual success.

Sincerely,

Thomas W. Steffens
Rear Admiral, U.S. Navy
Director, Intelligence and
Information Operations Center

UNITED STATES SPECIAL OPERATIONS COMMAND
7701 TAMPA POINT BLVD.
MACDILL AIR FORCE BASE, FLORIDA 33621-5323

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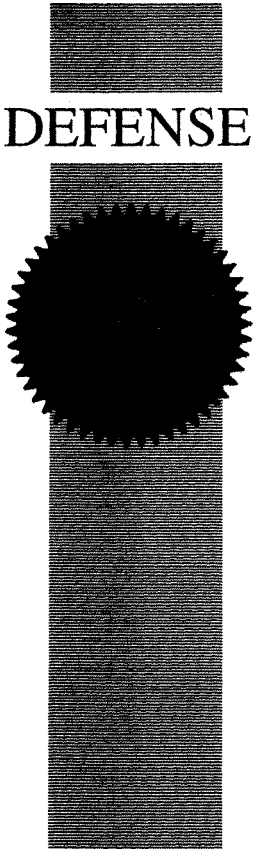
Thomas W. Steffens
Rear Admiral, U.S. Navy
Director, Intelligence and
Information Operations Center



DEFENSE INTELLIGENCE AGENCY

Special Achievement Award

for sustained superior performance

is awarded to

Anthony A. Shaffer

effective date

1 July 1997

ROBERT A. HARDING
Brigadier General, USA
Director for Operations

DEFENSE INTELLIGENCE AGENCY

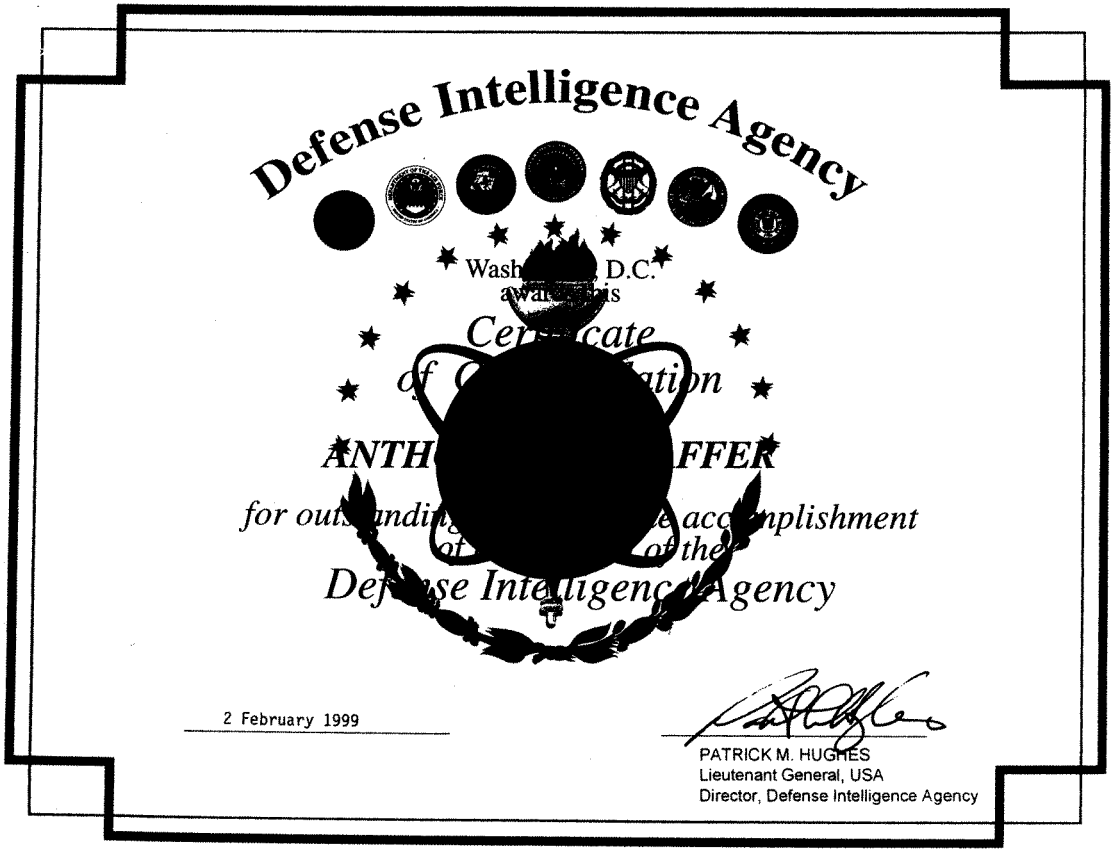
Special Achievement Award

for a significant contribution

is awarded to

Anthony A. Shaffer

ROBERT A. HARDING
Major General, USA
Director for Operations


Defense Intelligence Agency
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of the
Def se Intelligenc Agency
2 February 1999
PATRICK M. HUGHES
Lieutenant General, USA
Director, Defense Intelligence Agency

DEFENSE INTELLIGENCE AGENCY

WASHINGTON, D.C. 20340-

Col Dan Maguire
Defense Intelligence Agency
Defense Humint Service DHM-1
3100 Clarendon
Arlington, VA 22201

12 May 1997

Dear sir,

I am writing this letter to inform you of the excellent work Capt Tony Shaffer, USAF Reservist and DIA DHM-1 person did for the Joint Interagency Task Force East J-2 Directorate during his reservist duty here in March. As resident agency representative here, I was thoroughly impressed with Tony's professionalism and enthusiasm in accomplishing his active duty tour with the J-24 Collections Division.

Among the myriad of activities that Tony was involved in were preparing briefings on HUMINT support, drafting and coordinating a HUMINT Annex/Collection Plan for an upcoming JIATF-East CD operation, providing general operational advice and assistance concerning a full range of HUMINT Collection operations, and procuring additional reservists to work collection issues. He also supported this office during Col Stephen Fee's visit (DH-5) to the command, and was involved in coordinating CAPT Costarino's (JIATF-East J-2) visit to DIA DHS.

I know that CAPT Costarino, the Collections Division, and the J-2 Directorate in general are extremely appreciative of Capt Shaffer's work and everyone has come to value his efforts here. His knowledge and background of HUMINT and other intelligence issues, combined with his eagerness to support are a credit to the US Air Force and DIA. Capt Shaffer made the agency look good here and I hope that he will be allowed to continue to support JIATF-East in the future.

Sincerely,

Robert M. Estrada

Robert M. Estrada, GG-14
DIA Counterdrug Representative
JIATF-East
NAS Key West, FL

DEFENSE INTELLIGENCE AGENCY
WASHINGTON, D.C. 20340-0001

25 May 2000

THRU: DH-D

Dear Mr. Shaffer: Tony

I am very pleased to forward the attached note from Vice Admiral Thomas R. Wilson, Director, DIA, regarding the outstanding presentation you provided during the recent visit of the Honorable George J. Tenet, Director of Central Intelligence.

I join Admiral Wilson in commending you for your outstanding performance of duty. You clearly did a great job. Thank you.

Well Done!

Sincerely,

TERRANCE M. FORD
Acting Director for Operations

1 Enclosure a/s

Mr. Anthony A. Shaffer
Transnational Operations Division
Defense HUMINT Service

DIRECTOR DEFENSE INTELLIGENCE AGENCY
5 May 2000

THRU: *Deputy Director for Intelligence Operations*

TO: *Mr. Anthony A. Shaffer*
Defense HUMINT Service

Thank you for your impressive briefing during the recent visit of the Director of Central Intelligence, The Honorable J. George J. Tenet. You and the other DIA personnel who participated in the program put on a first-class show – the best-ever presentation of DIA's capabilities and expertise. You did a great job of describing the importance of providing timely support to the intelligence requirements of our military customers.

Thank you again for being a key contributor to this very successful visit.

Thomas R. Wilson
Vice Admiral, USN

DEFENSE INTELLIGENCE AGENCY
WASHINGTON, DC 20340

30 November 1999

THRU: DH-D

Dear Mr. Shaffer,

I am very pleased to forward the attached letter from Vice Admiral Thomas R. Wilson, Director, DIA, regarding the outstanding support you provided to the Joint Special Operations Command.

I join Admiral Wilson in commending you for your outstanding performance of duty. You are a first-class professional! I'm proud to have you on the DO team.

With best wishes,

Great!

ROBERT A. HARDING
Major General, USA
Director for Operations

1 Enclosure a/s

Mr. Anthony A. Shaffer
Trans-National Operations Division
Defense HUMINT Service

DIRECTOR DEFENSE INTELLIGENCE AGENCY

8 November 1999

THRU: *Deputy Director for Intelligence Operations*

TO: *Mr. Anthony A. Shaffer*
Defense HUMINT Service

I recently received a message from Major General Bryan D. Brown, Commanding Officer, Joint Special Operations Command, in appreciation for the excellent support you provided during your recent tour to his command.

I commend you for your superb performance of duty. You have represented our Agency well.

Thanks for a job well done.

Thomas R. Wilson
Vice Admiral, USN

DEFENSE INTELLIGENCE AGENCY
WASHINGTON, DC 20340

1 February 1999

THRU: DH-D

Dear Mr. Shaffer:

Extremely pleased to forward and endorse a letter of appreciation from Rear Admiral Thomas W. Steffens, Director, Intelligence and Information Operations Center, U.S. Special Operations Command. Your professional efforts on behalf of the Directorate for Operations reflect highly of you and are truly commendable.

Please accept my personal thanks for a job well done.

With best wishes,

1 Enclosure a/s

ROBERT A. HARDING
Brigadier General, USA
Director for Operations

Mr. Anthony A. Shaffer
Office of Operations
Defense HUMINT Service

DIRECTOR DEFENSE INTELLIGENCE AGENCY

U-659/DAH-2

12 MAY 1998

TO: DHM (ATTN: Mr. Anthony Shaffer)

SUBJECT: Exceptional Impact Promotion (EIP) Program

1. The Exceptional Impact Promotion (EIP) Program permits DIA to promote a small number of individuals who bring such extraordinary knowledge, skill, and ability to their jobs that they function at a higher level than normally expected of fully trained incumbents. This year, through a very competitive process both within the Directorate for Intelligence Operations (DO) and at the EIP Board, your expertise and unique skills were recognized as significantly impacting on the dimensions of your position.

2. It gives me great pleasure to approve the EIP Board's recommendation that you receive an exceptional impact promotion to the GG-14 level.

3. The EIP Board found noteworthy the excellence of all nominees, and because of the keen competition, you can be very proud of your selection.

4. Please accept my sincere congratulations on the exceptional work you have accomplished in support of DIA and the nation. I am proud to have you on my team.

PATRICK M. HUGHES
Lieutenant General, USA
Director

Mr. SHAYS. Just to clarify, you say that you are given clearance in the process of representing a client?

Mr. ZAID. It will vary from agency to agency. It is not necessary in many cases, but, for example, many of my clients are covert employees of the CIA or the DIA, and the very fact of their relationship to that agency is itself——

Mr. SHAYS. So is there a background check done to you? Are you treated almost as if you were a Federal employee that has a background check?

Mr. ZAID. No. In fact, that has been one of the problems as we try and argue that the Executive order or internal regulations apply. The agencies will say, no, you are not an employee.

What happens is essentially we are granted interim secret clearances. The CIA likes to call it "limited security access approval," which is a term that does not exist anywhere. And they will just do what is called a NAC, a national agency check. Do you have a criminal record? Does any other agency have derogatory information about you? And you may have to sign a non-disclosure secrecy agreement. I have only had one background check conducted on me, and that was because a Federal district judge ordered the CIA, DIA, and DOD to conduct it through the Department of Justice when they refused to grant me access to a classified manuscript.

Mr. SHAYS. Thank you.

Ms. Daley.

STATEMENT OF BETH DALEY

Ms. DALEY. Thank you, Chairman Shays. We really appreciate that you are having this hearing today, and I also want to thank you for taking leadership and a personal interest in the whistleblowers who have testified today. I think we have all learned quite a bit from them. I know I have.

I am pleased to be here today to offer the Project on Government Oversight's thoughts on the current situation with regard to national security whistleblowers.

In response to recent national news stories, many Government officials have decried the leaking of classified information to the press. POGO shares some of these concerns. However, our organization is much more concerned that criminal leak investigations and prosecutions will harm our Government over the long run by chilling criticism and scrutiny of potentially illegal or unethical activity. The larger goal of preserving our constitutional system of checks and balances will undoubtedly suffer.

Ideally, leaks of information to the news media would never happen. I think that is a sentiment that we all share. Unfortunately, we are living in an extremely imperfect world with regard to national security whistleblowers who want to expose corruption, incompetence, illegal activities.

What drives whistleblowers to disclose classified information to the press and to the public? We suspect an important reason lies in the fact that this Government and this country, have failed to create effective whistleblower protection programs.

All indications show that we have more whistleblowers coming forward since September 11th, perhaps as much as 50 percent

more annually. Less clear is whether we are hearing what they have to say.

Since the September 11th attacks, our Government has increasingly expanded the cloak of secrecy which keeps its activities hidden from the public. In some cases, this increased secrecy was warranted in response to the new threats that we face. However, in many cases, the secrecy is being created in order to take an agency's activities out of the public domain where they will be held accountable by the Congress, by watchdog organizations, by whistleblowers.

Those who retaliate against whistleblowers are rarely held accountable for their action. Even when a whistleblower is right—and we have seen this time and time again—they are rarely compensated for the loss of their job, their income, or their security clearance. As a result, there are few incentives for employees to come forward.

In the past week, policymakers have asserted that the Intelligence Community Whistleblower Act effectively protects whistleblowers. In fact, this information is false. The act fails to give employees the right to challenge retaliation, and it even fails to say that reprisals against whistleblowers will not be tolerated. As a result, the Pentagon's Inspector General itself today had deemed the title of the act a misnomer.

You are hearing important and compelling stories today. The fact that a new National Security Whistleblowers Coalition has been organized is the best evidence that change is urgently needed. But let me give you just one more example of another whistleblower.

During the late 1980's, Richard Barlow worked in the CIA and the Pentagon, and he uncovered A.Q. Khan's efforts to move Pakistan's nuclear weapons program forward. Mr. Barlow raised concerns internally about lies to Congress concerning Pakistan's nuclear programs. He did not even go to Congress, but he expressed concerns about the lies that were being told to Congress. And by merely suggesting that Congress should be told the truth, Mr. Barlow's stellar career was over. His security clearance was revoked. He suffered years of retaliatory investigations. His career was in tatters.

For over 15 years, he sought help to reverse the damage done by this retaliation, and there is good reason to believe that if the Government had heeded Mr. Barlow's warnings about Pakistan and its proliferation activities, we wouldn't be at the place that we are right now with regard to Iran and its emerging nuclear weapons program.

For the past year, the Senate Homeland Security and Governmental Affairs Committee has been considering whether or not to grant Mr. Barlow his retirement. But despite appeals from former high-level officials who saw firsthand what happened to Mr. Barlow, the Senate has failed to act.

If Members of the Congress and the Executive Board really are committed to stemming the leaks of classified information to the news media, they will do much more than launch witch hunts to root out leakers. They will create safe, legal, and discreet ways for national security whistleblowers to voice their concerns.

In particular, Congress needs to address the issue of security clearance retaliation. Employees should be given the opportunity to have a fair hearing by an impartial body that can rule on whether a security clearance revocation is retaliatory and require its restoration, if needed.

In addition, laws like the Lloyd LaFollette Act which protect disclosures to the Congress by Government employees are toothless without enforcement.

Other reforms that we would make are included in our "Homeland and National Security Whistleblower Protections" report, which I request be submitted in the record.

I want to note that earlier today when I was watching the questioning from the Members of Congress, I was struck by the fact that none of the whistleblowers here at the panel had ever been told what their whistleblower protections were, and yet under Representative Van Hollen's questioning, it was clear that everyone knew what a criminal violation of the FISA Act was.

Criminal laws are taken very seriously by the executive branch, and so if it became a crime to retaliate against whistleblowers, I bet everybody would know about it and pay a lot closer attention to it. And yet that is something that has never been done. So I encourage you to consider that option, and I know that several Members of Congress are putting forward proposals in that regard.

I should also say that the Inspector Generals have been a mixed bag. There was a lot of questioning today about the Inspectors General. What was not made clear is that it is very dangerous to go to the Inspectors General. There are leaks that happen from the Inspectors General to the agencies, and so many employees realize that by going to an Inspector General, they could be exposed within their agency and face retaliation.

Thank you very much.

[The prepared statement of Ms. Daley follows:]

Testimony of Beth Daley, Senior Investigator
Project On Government Oversight

Before the
House Subcommittee on National Security, Emerging Threats and International Relations

National Security Whistleblowers
February 14, 2006

Chairman Shays and the distinguished members of the Subcommittee, I am pleased to be here today to offer the Project On Government Oversight's thoughts on the current situation with regard to national security whistleblowers.

Founded in 1981, the Project On Government Oversight is an independent nonprofit that investigates and exposes corruption and other misconduct in order to achieve a more accountable federal government. Over our organization's 25-year history, we have worked with thousands of whistleblowers and government officials to shed light on the government's activities and systemic problems which harm the public.

In recent years, our organization's accomplishments include improving security standards at the nation's nuclear facilities, strengthening protections against government contractor fraud, preventing cases of excessive government secrecy, recovering millions of dollars in unpaid federal land oil drilling fees, and helping to eliminate wasteful military spending. Without exception, our organization's accomplishments would not have been possible without the assistance and expert guidance of government insiders and whistleblowers.

Unprecedented media attention has captured the public's eye concerning national security whistleblowers, whether it be Able Danger, secret detention centers in Europe, or NSA spy programs. In response to these national news stories, many members of Congress and high-ranking government officials have decried the leaking of classified information to the press, expressing concern about the possible harms to our government's ability to conduct the War on Terrorism effectively. The Project On Government Oversight shares some of these concerns. However, our organization believes that criminal leak investigations and prosecutions will harm our government over the long run by chilling criticism and scrutiny of potentially illegal or unethical activity. The larger goal of preserving our Constitutional system of checks and balances will undoubtedly suffer.

Ideally, leaks of classified information to the news media would not happen. Unfortunately, we are living in an imperfect world as it relates to whistleblowers who seek to stop corruption, law breaking, incompetence, and abuse of power. Front page stories on classified government programs confirm that some national security whistleblowers prefer disclosing possible wrongdoing to the national news media rather than to the Congress or internal government watchdogs.

What drives these individuals to disclose classified information to the press and the public? We suspect an important reason lies in the long-term failure of the government to create effective whistleblower protection programs, particularly for national security whistleblowers.[1]

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[1] Congressional Research Service, "National Security Whistleblowers," December 30, 2005. http://www.pogo.org/m/gp/gp-crs-nsw-12302005.pdf

Over time, many members of Congress have expressed a desire to protect their ability to oversee the Executive Branch by fostering whistleblower protections. In practice, however, the Congress has created few meaningful incentives for national security whistleblowers to come to Congress with evidence of illegal activities, corruption, or incompetence.

The need for effective whistleblower protections is even more urgent given the War on Terrorism and the challenges national and homeland security agencies face in retooling their efforts. Since the September 11, 2001, terrorist attacks, our government has increasingly expanded the cloak of secrecy which keeps its activities hidden from the public. In some cases, this expanded secrecy was a reasonable response to our heightened awareness of the new threats that face us. However, in many cases, government agencies are simply taking advantage of the nation's mood to take their activities out of the public realm where they would be held accountable by Congress, watchdog groups, and the news media.[2]

As a result, we are now much more reliant upon government employees to bring forward evidence of corruption or incompetence from inside the government. Many whistleblowers have responded. According to a 2004 study by the Government Accountability Office, civilian whistleblowers have come forward in greater numbers since 9/11 – almost 50% more have sought protection annually from one key whistleblower protection agency, the U.S. Office of Special Counsel. According to that report, "officials stated that the large increase was prompted, in part, by the terrorist events of September 11, 2001, after which the agency received more cases involving allegations of substantial and specific dangers to public health and safety and national security concerns."[3]

All indications show that we have more whistleblowers coming forward. Less clear is whether we are hearing what they have to say. The federal government's policies support and reinforce wrongdoers who would seek to silence and marginalize whistleblowers. Complicit in the current situation is a largely apathetic Congress which has created a largely inconsistent and frayed patchwork of protections across the federal government.

Congress has frequently considered what are called whistleblower protection policy reforms. However, many of those reforms only create a process for the whistleblower to report wrongdoing internally at their agency. Internal reporting and investigations *may* result in the government correcting whatever problems have occurred. Whether the agency chooses to fix the problem or to bury it, the whistleblower almost certainly pays a heavy price. And the reforms fail to reverse retaliation against whistleblowers who, in many cases, have had their careers destroyed.

Those who retaliate against whistleblowers are rarely held accountable for their actions. Even when a whistleblower was right, they are rarely compensated for the loss of their job, income or security clearance. As a result, there are few incentives for employees to blow the whistle.

Fear of retaliation is a very real concern. According to a Merit Systems Protection Board study, the number one reason government employees said they would not report wrongdoing was because they "did not think anything would be done to correct the activity." The next three top reasons given were: "afraid of being retaliated against," "reporting activity would have been too great a risk for me," and "I was afraid my identity would be disclosed."[4]

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[2] For example, the Department of Homeland Security's "For Official Use Only" policy effectively puts employees in the position of facing criminal or civil prosecution for disclosing information that would be made public under the Freedom of Information Act. For more, see POGO's comments on the regulations. http://www.pogo.org/p/government/gl-050101-dhs.html

[3] Government Accountability Office, "U.S. Office of Special Counsel: Strategy for Reducing Persistent Backlog of Cases Should be Provided to Congress," March 2004. http://www.gao.gov/new.items/d0436.pdf

[4] Project On Government Oversight, "Homeland and National Security Whistleblower Protections:

Employees at agencies such as the Department of Homeland Security, or civilian employees of the Pentagon must seek protection under the defunct Whistleblower Protection Act, a law rendered useless by a crippling series of activist judicial interpretations and dysfunctional whistleblower agencies. While these employees are able to seek legal recourse, their cases almost always end up at a dead end. Finally, critical slices of the government workforce have not even been given these weak protections, as Chairman Shays has pointed out in his past proposals to extend protections to Airport Baggage Screeners, who are on the front lines of our nation's airports.

Whistleblowers at key national security agencies including the Federal Bureau of Investigation, Central Intelligence Agency, Defense Intelligence Agency, Transportation Security Administration, and National Security Agency have been excluded from the meager legal protections afforded the rest of the federal workforce. As a result, when they lose their security clearance, are fired, or are otherwise retaliated against, they have no independent legal recourse for challenging retaliation. They are put in the untenable position of asking their employer to reverse the decision to retaliate against them.

In 1998, on the heels of a series of CIA scandals, members of Congress voiced concerns about leaks of classified information to the news media. As a result, the intelligence committees in the House and Senate held hearings and eventually passed the Intelligence Community Whistleblower Protection Act. [5]

This Act provides no protections against retaliation at all. Instead, it recommends that intelligence employees disclose matters of serious concern to their Inspectors General and to the heads of their agency before approaching intelligence committees in the Congress. Unfortunately, under threat of veto, Senate provisions which would have required that intelligence employees be notified about the option of disclosing to the Congress were eliminated.[6] No institution is aggressive at self-policing – let alone the intelligence agencies. So intelligence whistleblowers are relegated to reporting misconduct internally, and hoping that the wrong will be fixed and that they will not be punished for reporting the problem.

Chairman Shays recently noted: "The Cold War paradigm of 'need to know' must give way to the modern strategic imperative – the need to share."[7] "Need to share" should not only be a driving principle inside national security agencies, but also the principle that drives Congressional oversight of those agencies given the major changes and reforms underway. Yet, the Executive Branch continues to go to great lengths to prevent employees from communicating their concerns directly with the Congress, and has been remarkably successful in doing so.

More significantly, the Congress has often failed to punish the Executive Branch for lying or misleading Congress. In fact, in regard to whistleblowers, it has allowed the Executive Branch to crush individuals who sought to inform Congress that it is being misled.

You are hearing important and compelling stories from national security whistleblowers today. The fact that a new National Security Whistleblowers Coalition has been organized is the best evidence that change is urgently needed. Let me give you just one more example.

The Unfinished Agenda," April 28, 2005.

[5] The Intelligence Community Whistleblower Protection Act was included in the 1999 Intelligence Authorization bill, H.R. 3694. http://thomas.loc.gov/cgi-bin/bdquery/z?d105:HR03694:@@@D&summ2=m& and http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_public_laws&docid=f:publ272.105

[6] See Senate debate on the Intelligence Community Whistleblower Protection Act, March 9, 1998, via the Federation of American Scientists web site. http://www.fas.org/sgp/congress/s1668.html

[7] Statement of Rep. Christopher Shays, "Too Many Secrets: Overclassification as a Barrier to Critical Information Sharing," Subcommittee on National Security, Emerging Threats, and International Relations, August 24, 2004.

The case of Richard Barlow is an illustrative tale, particularly given the brewing controversy over Iran's emerging nuclear weapons program. If Congress and the Executive Branch had heeded Barlow's concerns about Pakistan, nuclear weapons programs in North Korea, Iran, and Libya probably would have never gotten off the ground. During the late 1980s, Mr. Barlow worked in the CIA and in the Office of the Secretary of Defense investigating and reporting on Pakistan and the A.Q. Khan nuclear weapons network. What he found was a disturbing pattern of technology and materials purchases in the U.S. and other countries aimed at moving Pakistan's nuclear weapons program forward.

After Mr. Barlow succeeded in capturing two of A.Q. Khan's agents, he faced resistance across the government because he was drawing unwanted attention to what was then a dirty secret. Namely, that numerous government agencies at that time were turning a blind eye to the threat posed by the expansion of Khan's nuclear program. Pakistan was considered a central ally in the region for U.S. efforts to liberate Afghanistan from Soviet Union occupation.

In 1989, Mr. Barlow's career crashed against the Executive Branch's lies. Mr. Barlow raised concerns internally about Defense Department officials who had lied to Congress concerning Pakistan's nuclear programs. By merely suggesting that Congress should know, but never actually going to Congress, Mr. Barlow's stellar career was over. Mr. Barlow's higher ups took away his security clearances and then proceeded to punish him for years with retaliatory investigations designed to smear his reputation. As an intelligence professional, the loss of his clearance meant he had no way to be employed – either inside or outside the government. For over 15 years, he has sought help to reverse the damage done in retaliation for thinking about informing Congress of a lie. A significant lie.

For the past year, the Senate Homeland Security and Governmental Affairs Committee has been considering whether or not to grant Mr. Barlow his retirement. Despite appeals from former high-level officials who saw first-hand what happened to Mr. Barlow, the Senate has failed to act. While the Senate has waffled on whether to provide Mr. Barlow his retirement, Congress has earmarked billions of dollars in funds for such ridiculous projects as the Tiger Woods Foundation, the Waterfree Urinal Conservation Initiative, the Arctic Winter Games, stainless steel toilets, wood utilization research, and the Paper Industry Hall of Fame.[8]

Where are the Congress' priorities?

Finalizing the decision to give Mr. Barlow his retirement would send a clear signal to national security employees that efforts to challenge lying to Congress and other illegal activities will not be punished. As things currently stand, some in the intelligence community appear to be seeking safer havens in airing their concerns to the national news media.

Recent leaks to the news media underscore that important unresolved questions continue to fester behind the closed doors of our national security agencies and require intervention by the Congress. Last week's NSA spying hearings in the Senate prompted Timothy Lynch of the Cato Institute to say: "The overriding issue that's at stake in these hearings is the stance of the administration that they're going to decide in secrecy which laws they're going to follow and which laws they can bypass."[9]

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[8] Citizens Against Government Waste, "Pig Book Oinkers of 2005," and Taxpayers for Common Sense, "Statement on Defense Spending Bill," December 22, 2005. http://www.taxpayer.net/TCS/PressReleases/2005/12-22defensebill.htm & http://www.cagw.org/site/PageServer?pagename=reports_pigbook2005Oinkers

[9] Babington, Charles, "Activists on Right, GOP Lawmakers Divided on Spying," Washington Post, February 7, 2006.

If members of the Congress and the Executive Branch really are committed to stemming leaks of classified information to the news media, they will do much more than launch witch hunts to root out leakers. They will create safe, legal, and discreet ways for national security whistleblowers to voice their concerns. Doing so would be in keeping with the goal of fostering a U.S. national security culture that is more agile and which embraces information-sharing over secrecy.

In particular, Congress needs to address the issue of security clearance retaliation. Taking away an employee's security clearance has become the weapon of choice for wrongdoers who retaliate. When a security clearance is revoked, the employee is effectively fired, since they are unable to do their job or pursue other job opportunities in their area of expertise. Currently, the employee is unable to appeal to an independent body to challenge the retaliation and internal hearings are Kafkaesque. Among the practices we have been made aware of in recent years: whistleblowers are not told the charges against them, they are not allowed to dispute those charges, or they are prevented from presenting their case before internal panels which decide.

We believe employees should be given the opportunity to have a fair hearing by an impartial body that can rule on whether the security clearance revocation is retaliatory, and require its restoration. Pending legislation in the Senate – the Federal Employees Disclosure Act (S. 494) – would take steps toward accomplishing this goal. The courts and the Justice Department have acknowledged that independent judicial reviews of security clearance cases can be conducted.

Congress should create penalties for those who retaliate against whistleblowers who communicate with Congress. Laws like the Lloyd LaFollette Act which protect disclosures to Congress by government employees are toothless without enforcement.

Other reforms that the Project On Government Oversight recommends are included in our 2005 report "Homeland and National Security Whistleblower Protections: the Unfinished Agenda."

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Project On Government Oversight

Homeland and National Security Whistleblower Protections: The Unfinished Agenda

April 28, 2005

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Executive Summary

Since the September 11th terrorist attacks, whistleblowers have felt compelled to come forward in greater numbers to address our nation's security weaknesses – in fact almost 50% more have sought protection annually.[1] Since 9/11, whistleblower-support organizations have heard a common theme from whistleblowers, many of whom have observed security weaknesses for years: That they could no longer stand by knowing that people's lives were at risk.

However, patriotic truth-tellers across a variety of agencies have no protection against retaliation from the agencies they seek to reform. Today, the federal government's policies support and reinforce wrongdoers who would seek to silence whistleblowers.

Whistleblowers at key government agencies tasked with protecting the U.S. (including the FBI, CIA, Defense Intelligence Agency, Transportation Security Administration, and National Security Agency) have been excluded from the meager protections afforded the rest of the federal workforce. Employees at other agencies such as the Department of Homeland Security must seek protection under the defunct Whistleblower Protection Act, a law rendered useless by a crippling series of judicial interpretations from a court with a monopoly on reviewing whistleblower cases.

The agenda for protecting homeland security whistleblowers is unfinished. Congress must act to implement laws that will provide meaningful protections for whistleblowers including reasonable standards for qualifying for protection, the right to seek remedies in the courts, prompt resolution of their cases, and an end to retaliation when it occurs.

[1] Government Accountability Office, "U.S. Office of Special Counsel: Strategy for Reducing Persistent Backlog of Cases Should be Provided to Congress," March 2004. http://www.gao.gov/new.items/d0436.pdf. Retrieved April 27, 2005.

Introduction

"[D]emocracy's best oversight mechanism: public disclosure"
9-11 Commission Report

In May 2002, a memo written by FBI Special Agent Coleen Rowley to FBI Director Robert Mueller brought unprecedented public attention to the government's shortcomings in investigating the terrorists suspected in the September 11th attacks. This attention and the work of the 9/11 families helped give birth to the independent 9/11 Commission tasked with investigating the devastating terrorist attacks. It also prompted *Time Magazine* to recognize Rowley as one of three *Time* Persons of the Year in 2002.[2]

Since 9/11, whistleblowers have felt compelled to come forward in greater numbers to address our nation's security weaknesses – in fact almost 50% more annually have sought protection against retaliation. Officials at the federal government's whistleblower protection agency, the U.S. Office of Special Counsel, noted that the increase "was prompted, in part, by the terrorist events of September 11, 2001, after which the agency received more cases involving allegations of substantial and specific dangers to public health and safety and national security concerns."[3] (Appendix A)

Whistleblowers like Coleen Rowley make our nation safer. They inform authorities about such dangers as security vulnerabilities in our intelligence-gathering capabilities, at nuclear power plants and weapons facilities, in airports, and at our nation's borders and ports. They are modern-day Paul Reveres who warn about threats to the public's well-being *before* avoidable crimes or disasters occur. The 9/11 Commission itself recognized that "democracy's best oversight mechanism" is "public disclosure."[4] Whistleblowers provide that oversight, and they risk their jobs to do so.

But the federal government has failed to protect them.

Instead of being rewarded for their patriotism, national and homeland security whistleblowers face harassment, job-loss, demotion, loss of their security clearance (which effectively ends their career) and other retaliation. Many of them are not even given the right to have their day in court to challenge harassment.

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[2] Ripley, Amanda and Maggie Sieger, "Time Persons of the Year 2002: The Special Agent," *Time Magazine*, December 22, 2002. http://www.time.com/time/personoftheyear/2002/poyrowley.html. Retrieved April 27, 2005.

[3] Government Accountability Office, "U.S. Office of Special Counsel: Strategy for Reducing Persistent Backlog of Cases Should be Provided to Congress," March 2004. http://www.gao.gov/new.items/d0436.pdf. Retrieved April 27, 2005.

[4] *The 9/11 Commission Panel Report*. p. 103, July 2004.

Their disclosures are even more important in light of the fact that national and homeland security agencies have an almost unlimited ability to hide behind the government's dramatically expanding framework of secrecy rules. As Senator Charles Grassley (R-IA) testified:

> "Since September 11th, government agencies have placed a greater emphasis on secrecy and restricted information for security reasons. This is understandably so in some cases. But, with these restrictions come a greater danger of stopping the legitimate disclosure of wrongdoing and mismanagement, especially about public safety and security. Bureaucracies have an instinct to cover up their misdeeds and mistakes, and that temptation is even greater when a potential security issue can be used as an excuse. Whistleblowers serve as a check against this instinct and temptation."[5]

The broken whistleblower-protection system and increased secrecy have emboldened wrongdoers to retaliate against or silence those who expose their abuses of power. When U.S. Park Police Chief Theresa Chambers warned that September 11th-related cuts meant fewer cops on the beat, she was fired. When Transportation Security Administration Red Team members found guns still getting through airport checkpoints, they were silenced and demoted. Department of Energy employees were punished for disclosing security failures at nuclear weapons facilities. FBI whistleblowers who exposed the agency's failure to conduct investigations into terrorists were demoted, fired or driven out of their jobs.

In July 2002, Congress, with the passage of the Sarbanes-Oxley Act, recognized the importance of whistleblowers to the nation's economy and its investors by providing state-of-the-art protections for whistleblowers at publicly traded companies. In August 2004, when the Bush Administration announced its new procedures for corporate whistleblower protections, Secretary of Labor Elaine L. Chao stated: "Whistleblower protection is an important part of the Sarbanes-Oxley Act, which this Administration has promoted to ensure corporate responsibility, enhance public disclosure and improve the quality and transparency of financial reporting and auditing. The whistleblower protection provision of Sarbanes-Oxley will protect courageous workers who speak out against corporate abuse and fraud." Today, corporate whistleblowers are much better protected from retaliation than their counterparts in the public sector, even though the consequences of corruption in government are equally, if not more, far-reaching.

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[5] Statement of Senator Charles Grassley to the Senate Committee on Governmental Affairs, "S. 1358, the Federal Employee Protection of Disclosures Act: Amendments to the Whistleblower Protection Act," November 12, 2003. http://www.senate.gov/~gov_affairs/index.cfm?Fuseaction=Hearings.Testimony&HearingID=129&WitnessID=452. Retrieved April 27, 2005.

Yet neither Congress nor the Executive Branch have seen fit to provide homeland security personnel with protections equal to those employees of Enron and MCI/Worldcom. The best that some whistleblowers can hope for is to seek refuge under the defunct Whistleblower Protection Act, a law that has been decimated by the courts. That Act covers employees of agencies including:

- Department of Homeland Security (except airport baggage screeners), which protects the nation's borders and coasts;
- Department of Energy and the Nuclear Regulatory Commission, which protect nuclear power plants and facilities against radiological sabotage;
- Environmental Protection Agency, which protects the nation's water supply;
- Department of Agriculture, which protects the food supply;
- Department of Defense (civilian, non-intelligence), which fights terrorism and protects national security.

Not Covered By Whistleblower Protection Act
Airport Baggage Screeners
Armed Forces (uniformed military)
Central Intelligence Agency
Defense Intelligence Agency
Defense Mapping Agency
Federal Bureau of Investigation
Government Accountability Office
Government Contractors
National Security Agency

However, whistleblowers at other homeland security agencies are not even given the meager and inadequate protections afforded under the Whistleblower Protection Act. These agencies include:

- Central Intelligence Agency and the Federal Bureau of Investigation, which investigate and pursue counter-terrorism measures;
- Other intelligence agencies inside the Department of Defense such as the Defense Intelligence Agency;
- Airport baggage screeners, who are at the front lines of protecting commercial aircraft; and
- National Security Agency, which protects intelligence communications.

At these agencies, there is no third-party review of whistleblower cases. As a result, the institution that is retaliating against the whistleblower acts as the judge and jury of its own alleged harassment. It also decides whether those who retaliate against whistleblowers are disciplined, something that, by all accounts, rarely happens.

The Unfinished Agenda

Retaliation Against Whistleblowers: Limited Recourse

One person challenging the bureaucracy of an entire government agency is a David-versus-Goliath struggle. In terms of raw power, the agency holds all the cards. Time and again, employers have abused this power to silence whistleblowers.

Over the years, Congress has authorized, in a piecemeal fashion, a variety of whistleblower "protection" programs throughout the federal government including for national and homeland security employees. However, many of these provisions only authorize investigations to determine whether a whistleblower's allegations are true or not. They do not create sustainable mechanisms for overturning retaliation against whistleblowers or to disciplining managers who have sought to silence truth-tellers. The clear message sent to government employees is that wrongdoers in positions of power are unassailable and whistleblowing is quixotic at best.

This view was confirmed in a 1993 study by the federal Merit Systems Protection Board, the government agency which hears Whistleblower Protection Act (WPA) claims. That study was the most recent by the agency to assess what motivates employees to blow the whistle. In response to the question about "why observers chose not to report illegal or wasteful activities," three of the top four reasons concerned fear of retaliation. (Appendix B)

In more recent studies, the Merit Systems Protection Board has found that retaliation against federal employees have remained a significant problem. In the Board's most recent survey in 2000, seven percent (or one out of 14) of all federal employees responded that they had been retaliated against in the previous two years for "Making a disclosure concerning health and safety dangers, unlawful behavior, and/or fraud, waste, and abuse." According to the survey, retaliation rates quickly escalate when formal disclosures are made. Fully 44% of survey respondents who made a formal disclosure experienced retaliation, compared to just 4% who had not made a formal disclosure. (Appendix C)

The recourse for whistleblowers experiencing retaliation is severely limited. For example, many of the investigations authorized by Congress are conducted by the agency under investigation, which institutionally has little incentive to acknowledge whistleblower complaints. Inspectors General (IG) within each agency are most often called upon to conduct these investigations. *The Art of Anonymous Activism*, a how-to book for whistleblowers, outlines the shortcomings of IGs:

"While the IG touts itself as independent, that is not really the case. At small agencies, the agency head appoints the IG. For larger agencies, the IG is nominated by the President and confirmed by the Senate. The IG reports to the head of the agency and serves at the pleasure of the President. In other words, if an IG is upsetting the Administration's apple cart, he or she can be instantly removed.

The IG's performance appraisal comes from the agency head, who also controls issuance of awards and financial bonuses to the IG. As a consequence, many IG offices are quite political in the selection of cases for investigation and the manner in which its findings are cast."[6]

Typical Forms of Retaliation

✦**Take away job duties** so that the employee is marginalized.
✦**Take away an employee's national security clearance** so that he or she is effectively fired.
✦**Blacklist an employee** so that he or she is unable to find gainful employment.
✦**Conduct retaliatory investigations** in order to divert attention from the waste, fraud, or abuse the whistleblower is trying to expose.
✦**Question a whistleblower's mental health**, professional competence, or honesty.
✦**Set the whistleblower up** by giving impossible assignments or seeking to entrap him or her.
✦**Reassign an employee geographically** so he or she is unable to do the job.

In addition, it is not unusual for the employee who has reported misconduct to be exposed and to even become the target of an investigation conducted by an IG or other agency official. In some cases, management starts an investigation in order to discredit and harass employees who are deemed troublesome.

More importantly, such investigations fail to provide whistleblowers with a hearing by a truly independent court or administrative body that can hold agencies accountable for retaliation. Time and again, whistleblower attorneys and advocates have found that verifying a whistleblower's allegations is not enough: managers who retaliate against whistleblowers may continue to do so unless ordered to stop.

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[6] *The Art of Anonymous Activism*, published by the Government Accountability Project, Public Employees for Environmental Responsibility, and Project On Government Oversight, 2002, p. 20. http://www.pogo.org/p/government/ga-021101-whistleblower.html.

Broken: The Whistleblower Protection Act

The most significant statute aimed at protecting federal whistleblowers is the Whistleblower Protection Act (WPA). The WPA covers civil service employees, but does not apply to uniformed military, employees at intelligence agencies, the Federal Bureau of Investigation, government contractors, or airport baggage screeners.

Originally passed in 1989, the Whistleblower Protection Act is the most important free speech law for federal employees. Unlike many other whistleblower provisions, it allows employees to seek intervention by an outside independent agency, the Office of Special Counsel; access to an administrative legal proceeding to hear their case at the Merit Systems Protection Board; and, ultimately, access to the court to hear appeals to the case.

Despite the rights the Act provides on paper, it has suffered from a series of crippling judicial rulings that are inconsistent with Congressional intent and the clear language of the Act. These rulings have rendered the Act useless, producing a dismal record of failure for whistleblowers and making the law a black hole.

According to the Government Accountability Project, only two out of 30 whistleblowers have

Congress has Repaired Whistleblower Protection Act Repeatedly

1978	Congress includes language in the Civil Service Reform Act protecting employees from retaliation for making disclosures of information regarding misconduct.
1989	After the courts and government agencies create loopholes that limit who is protected, Congress unanimously passes Whistleblower Protection Act (WPA).
1994	Because the courts and agencies continue to create exceptions for who is protected, Congress passes amendments to strengthen the WPA. The amendments are approved unanimously by Congress.
2004	A series of hostile judicial rulings since 1994 have once again crippled the Whistleblower Protection Act. Congress considers the Federal Employees Protection of Disclosures Act (S. 2628) and the Whistleblower Protection Enhancement Act (H.R. 3281).

prevailed on the merits in cases decided since 1999 at the Merit Systems Protection Board, the government agency which hears WPA claims. Even worse, at the Federal Circuit Court of Appeals, which has exclusive jurisdiction over WPA appeals of administrative rulings, only one whistleblower claimant out of 96 has prevailed on the merits in the past 10 years.

A number of rulings have made it virtually impossible for whistleblowers to defend themselves. In addition, serious questions have been raised about the effectiveness of the Office of Special Counsel and its ability to handle whistleblower cases in a proper and timely way.

Unreasonable Standards of Proof. The Federal Circuit Court has repeatedly disregarded congressional intent to extend protections broadly to whistleblowers and has issued a number of hostile rulings. For example, in 1999 in the case of *Lachance v. White*, the court decreed that the law only shields those charging government misconduct when that charge is supported by "irrefragable proof"[7] (defined by the dictionary as "undeniable, uncontestable, incontrovertible or incapable of being overthrown"[8]). This standard never appears in the statute, reports by Congress on the language of the WPA, or any decision by the Merit Systems Protection Board involving whistleblower claims. Amendments to the statute approved by Congress in 1994 only require that the "employee reasonably believe his or her disclosure evidences" misconduct. Congress set this standard to provide protections to whistleblowers who might be "wrong" about their allegations, as well as those who were right.

Whistleblower Protection Act Loopholes – Employees are NOT Covered if They:

- ✦ Report wrongdoing to their boss or in the chain of command.
- ✦ Tell co-workers or those suspected of wrongdoing.
- ✦ Challenge policies.
- ✦ Have job duties to find or point out wrongdoing.
- ✦ Are the not the first to raise the problem.

The unreasonable standard set by the court makes it virtually impossible for a whistleblower to prevail unless the wrongdoer confesses, in which case there is no need for a whistleblower. A recent Senate report commented that: "This imposes an impossible evidentiary burden on whistleblowers, and there is nothing in the law or legislative history that even suggests such a standard under the WPA."[9] According to the Government Accountability Project, in the three years prior to *Lachance*, whistleblowers had a 36% success rate for decisions on the merits at the Merit Systems Protection Board. Since *Lachance*, that success rate has plummeted to 7%.

Unreasonable Limitations on How Disclosures are Made. A myriad of additional loopholes defies logic. The Court has decreed that protections should be withheld from whistleblowers who make their disclosures to co-workers, supervisors or others in the chain of command, or the person suspected of wrongdoing. However, any reasonable person would expect an employee to approach their supervisor or higher-ups to resolve a problem before blowing the whistle to the media or to Congress.

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[7] U.S. Federal Circuit Court of Appeals, *Lachance v. White* 98-3249, May 14, 1999. http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=fed&navby=case&no=983249. Retrieved April 27, 2005.

[8] Congressional Testimony of Thomas Devine, Legal Director, Government Accountability Project, before the Senate Governmental Affairs Committee on S. 1358, November 12, 2003. http://hsgac.senate.gov/_files/111203devine.pdf. Retrieved April 27, 2005.

[9] Senate Committee on Governmental Affairs Report 107-349, "To authorize appropriations for the Merit Systems Protection Board and the Office of Special Counsel, and for other purposes, to accompany S. 3070," November 19, 2002. http://thomas.loc.gov/cgi-bin/cpquery/0?&&dbname=cp107&&&r_n=sr349.107&&sel=DOC&. Retrieved April 27, 2005.

Whistleblowers are also not protected when disclosures are made in the course of doing their job's duties, as is the case for employees who conduct audits or investigations into wrongdoing such as Inspector General offices. Elaine Kaplan, the former head of the U.S. Office of Special Counsel, recently described this loophole in testimony before the Senate:

> "Suppose that a security screener at National Airport who works for the Transportation Security Administration notices that the X-ray machines are malfunctioning on a regular basis. He suspects that, because of these malfunctions, a number of passengers may have been permitted to board airlines without being screened. It is part of his job to report such malfunctions to his supervisor. The screener goes to his supervisor and tells him about the malfunctioning machines. The supervisor tells the employee not to write up a report but to go back to work – he does not want to do the paperwork and does not want it to get out that the X-ray machines at National Airport don't work properly. He tells him, don't worry, we will get the problem fixed.
>
> One week later, the employee returns and the problem has not been fixed. This time, he tells his supervisor, if nothing is done, he will report the supervisor's inaction up the chain of command, or perhaps to the IG [Inspector General]. The supervisor fires the employee.
>
> Under current law, this employee has no recourse. Because he made his disclosure as part of his regular job duties, he is not protected by the anti-retaliation provisions of the Whistleblower Protection Act. In fact, as a security screener at TSA, this employee does not even have the normal adverse action protections any other employee would have.
>
> This same scenario could play out in any number of contexts: an inspector at the Nuclear Regulatory Commission who suffers retaliation when he recommends that a nuclear power plant's license be revoked for violating safety regulations, an auditor who is denied promotions because he found improprieties in a federal grant program, or an investigator in the Inspector General's office who is geographically reassigned because he has reported misconduct by a high level agency official."[10]

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[10] Statement of Elaine Kaplan to the Senate Committee on Governmental Affairs, "S. 1358, the Federal Employee Protection of Disclosures Act: Amendments to the Whistleblower Protection Act," November 12, 2003. NOTE: Since this testimony, Whistleblower Protection Act rights have been definitively stripped from airport baggage screeners. However, this description aptly illustrates the dilemma faced by employees blowing whistle during the course of their job duties.
http://www.senate.gov/~gov_affairs/index.cfm?Fuseaction=Hearings.Testimony&HearingID=129&WitnessID=460. Retrieved April 27, 2005.

National Security Clearance Retaliation. Revocation of an employee's national security clearance has become the weapon of choice for those managers who retaliate. As Tom Devine, the legal director of the Government Accountability Project, recently testified: "The Court rejected Congress' policy choice in 1994 amendments to cover security clearance retaliation under the WPA."[11] The result is that an employee whose security clearance is yanked can be fired without recourse. The story of whistleblower Linda Lewis from 2002 illustrates how unaccountable and unfair the process for addressing security clearance retaliation has become. According to the Government Accountability Project:

> "Lewis is not allowed to appear before the judges who will make a decision on her clearance. A single USDA official will decide how much, if any, of her defense is to be allowed into the official record for review by the unidentified judges. Rounding out this Kafkaesque scenario, Lewis is required to present her defense in writing before she learns the details of the charges – if they are ever revealed to her."[12]

The Department of Defense Inspector General deserves credit for a new initiative launched in January of 2005 that recognizes the problem of national security clearance retaliation. The initiative allows the IG to investigate this kind of retaliation and make recommendations to the Department of Defense Secretary.[13]

Federal Circuit Monopoly on Cases. The Whistleblower Protection Act can only be reviewed by one court – the Federal Circuit Court of Appeals: they are not reviewed in other circuit courts. If there is an unfair decision, a whistleblower's only recourse is the Supreme Court which takes few cases where there is no split in opinion among the circuits. As a result, anti-whistleblower rulings are allowed to stand. Multiple circuits review was the structure originally provided under the Civil Service Reform Act of 1978, until the creation of the Federal Circuit in 1982 in the Federal Courts Improvement Act. The Federal Circuit's stranglehold on WPA cases since then is inconsistent with all circuits review afforded under other federal whistleblower protection statutes, particularly for employees at publicly-traded companies. It is also inconsistent with the normal appellate option available to employees alleging other forms of discrimination.

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[11] Congressional Testimony of Thomas Devine, Legal Director, Government Accountability Project, before the Senate Governmental Affairs Committee on S. 1358, November 12, 2003. http://govt-aff.senate.gov/_files/111203devine.pdf. Retrieved April 27, 2005.

[12] Andersen, Martin Edwin, "Rally for USDA National Security Whistleblower Linda Lewis," Government Accountability Project, June 18, 2002. http://www.whistleblower.org/article.php?did=207&scid=80. Retrieved April 27, 2005.

[13] Miles, Donna, "DoD Expands Existing Whistleblower Protections," American Forces Informative Service, April 18, 2005. Retrieved April 27, 2005.

Judicial Defiance of Congressional Intent. Because of the Federal Circuit Court's hostile rulings, and because there is not an all circuits review which would allow a more vigorous judicial debate on interpretation of the law, Congress has repeatedly had to instruct the Court of its intent. Congress has already passed legislation twice in order to repair damage done by the Court, and is now forced to weigh in a third time because of the rulings that have rendered the Whistleblower Protection Act useless.

The first time was in 1989 with the passage of the WPA, crafted to repair loopholes created in whistleblower protection provisions of the Civil Service Reform Act of 1978. In the Senate Committee Report in 1988 on the WPA, Congress instructed:

> "The Committee intends that disclosures be encouraged. The OSC [Office of Special Counsel], the [Merit Systems Protection] Board, and the courts should not erect barriers to disclosures which will limit the necessary flow of information from employees who have knowledge of government wrongdoing. For example, it is inappropriate for disclosures to be protected only if they are made for certain purposes or to certain employees or only if the employee is the first to raise the issue."[14]

Just five years later, in 1994, Congress was forced once again to make its intent clear. The legislative history summarizing the composite House-Senate compromise noted:

> "The plain language of the Whistleblower Protection Act extends to retaliation for `any disclosure,' regardless of the setting of the disclosure, the form of the disclosure, or the person to whom the disclosure is made."[15]

Despite the clear legislative history and instructions to the contrary, the Federal Circuit Court has once again carved out exceptions to the Whistleblower Protection Act. As a result, Senator Charles Grassley (R-IA), one of the deans of whistleblower protection in Congress, called for an end to the judicial nightmare when he helped introduce legislation, saying: "This is also three strikes for the Federal Circuit's monopoly authority to interpret, and repeatedly veto, this law. It is time to end the broken record syndrome."[16] Unfortunately, in 2004, the House Government Reform Committee Chairman Tom Davis (R-VA) failed to recognize the problem of the Federal Circuit's monopoly. Legislation to repair the WPA excluded a provision to return whistleblower cases to all circuits review. Although that legislation failed in 2004, it will likely be taken up again.

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[14] Senate Committee on Governmental Affairs Report 107-349, "To authorize appropriations for the Merit Systems Protection Board and the Office of Secial Counsel, and for other purposes, to accompany S. 3070," November 19, 2002.
http://thomas.loc.gov/cgi-bin/cpquery/0?&&dbname=cp107&&&r_n=sr349.107&&sel=DOC&. Retrieved April 27, 2005.

[15] Statement of Senator Akaka, Congressional Record: June 7, 2001.
http://www.fas.org/sgp/congress/2001/s060701.html. Retrieved April 27, 2005.

[16] "Senators Try to Curb Federal Circuit," *Legal Times*, September 3, 2001, p. 6.

A Dysfunctional Office of Special Counsel. There have been problems with the Office of Special Counsel's ability to handle its mission of protecting whistleblowers since its creation. Recently, things have been getting even worse. A March, 2004 Government Accountability Office report noted that the agency had accumulated a significant backlog of cases that were not being handled within the time limits required by Congress. According to the report, the Office of Special Counsel "met the 15-day statutory limit for whistleblower disclosure cases about 26 percent of the time," adding, "The percentage of whistleblower cases in backlog was always extremely high—95 to 97 percent."[17]

In April 2004, controversy engulfed the Office of Special Counsel after its head, Scott Bloch, sent an email to his staff that amounted to an illegal order to prevent staff from communicating with the public. This act raised concern in Congress and among whistleblower advocates given that the Office of Special Counsel is the federal government's protector of free speech rights for whistleblowers. The controversy over whether the agency would continue to protect workers from discrimination based on sexual orientation. After complaining in media interviews about "leakers" within his own agency being responsible for the controversy, Bloch issued the following to all agency staff:

> "[The] Special Counsel has directed that any official comment on or discussion of...sensitive internal agency matters with anyone outside OSC must be approved in advance ..."[18]

The order forbade employees from discussing the policy with outsiders, including other federal agencies asking for guidance, and instead ordered that they "simply refer them to the press release on our web site as a complete and definitive statement of OSC's policy."[19] The White house ultimately overruled Bloch's interpretation of the policy and asserted that the Office of Special Counsel was indeed responsible for investigating and handling sexual orientation discrimination cases.

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[17] Government Accountability Office, "U.S. Office of Special Counsel: Strategy for Reducing Persistent Backlog of Cases Should be Provided to Congress," March 2004. http://www.gao.gov/new.items/d0436.pdf. Retrieved April 27, 2005.

[18] Government Accountability Project, Project On Government Oversight, and Public Employees for Environmental Responsibility, Letter to U.S. Special Counsel Scott Bloch, April 15, 2004. http://pogo.org/p/government/gl-040402-osc.html.

[19] Government Accountability Project, Public Employees for Environmental Responsibility, and Project On Government Oversight Press Release, "U.S. Special Counsel Issues Gag Order to His Own Employees," April 15, 2004. http://www.pogo.org/p/government/gl-040402-osc.html.

In 2005, more controversy surrounded the Office of Special Counsel. In conjunction with anonymous employees at the agency, three leading whistleblower assistance organizations – Government Accountability Project, Public Employees for Environmental Responsibility, and Project On Government Oversight – filed a complaint with a lengthy list of allegations about improper activities at the agency and mishandling of whistleblower cases. Among the more disturbing allegations made was that the Office of Special Counsel, in an effort to make its backlog of cases disappear, was no longer giving the same level of attention to the investigation of whistleblower disclosures. The complaint noted that: "As a result of this new policy, the Disclosure Unit appears to have closed over 600 cases in only a few months, without referring any of them for investigation."[20]

In response, the Senate Homeland Security and Government Affairs Committee promised to have hearings on the Office of Special Counsel. At the writing of this report, the Senate is investigating the agency but has not yet scheduled the hearings.[21] In addition, the President's Council on Integrity and Efficiency is investigating the complaint filed by the anonymous employees and the groups.[22]

The controversy surrounding the Office of Special Counsel already adds weight to a growing body of evidence showing that, even under the best leadership and circumstances, very few whistleblowers get the kind of assistance and support from the agency that was originally envisioned by the Congress.

Under Assault: Transparency in Government

Since the terrorist attacks on September 11, 2001, government agencies have gone to great lengths to create new and greatly expanded categories of information that can be kept secret from the public under the guise of protecting homeland security. At the same time, the government has attempted to push the boundaries of the secrecy rules already at its disposal.[23] Expanding secrecy creates two problems of note for this discussion.

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[20] Complaint of Prohibited Personnel Practices of Scott Bloch, March 24, 2005. http://www.pogo.org/m/gp/gp-OSCcomplaint-03032005.pdf.

[21] Barr, Steve, "Agency's Reorganization Results in Accusations, Employees Leaving," Washington Post, March 18, 2005. http://www.washingtonpost.com/wp-dyn/articles/A45169-2005Mar17.html. Retrieved April 27, 2005.

[22] Wilke, John, "Crying Foul at Whistle-Blower Protector: Some Staff From U.S. Office of Special Counsel Claim Wrongdoing by the Agency's Chief," *Wall Street Journal*, March 31, 2005.

[23] Aftergood, Steve, Federation of American Scientists, "The Age of Missing Information," http://slate.msn.com/id/2114963/. Retrieved April 27, 2005.

First, it makes protection of whistleblowers even more imperative. If agencies have *carte blanche* to keep information from the public, one of the most important ways that wrongdoing can be exposed is through disclosures from government employees. Second, some government agencies have created new rules for punishing federal employees who disclose internal information. These rules cast a veil over the government's activities, ensuring that employees have even less reason to risk their careers to whistleblowing.

One of the most egregious examples was a directive issued by the Department of Homeland Security (DHS) for the handling of documents that may be marked "For Official Use Only" (FOUO). According to the directive, DHS employees should: "Be aware that divulging information without proper authority could result in administrative or disciplinary action." Contractors and consultants are still being required to sign non-disclosure agreements that say they "could be subjected to administrative, disciplinary, civil, or criminal action, as appropriate, under the laws, regulations, or directives applicable to the category of information involved." Ironically, the directive admits that information marked FOUO may still be disclosed under the landmark open government law, the Freedom of Information Act. It also creates exceptionally vague categories of information that should be kept from the public and encourages employees to err on the side of caution. The result: "In essence, DHS is silencing the nation's already muted federal workforce – the only people who can alert the public when the government is not doing its job." [24]

Another example concerned the case of FBI whistleblower Sibel Edmonds. In June, 2004 the Project On Government Oversight (POGO) filed a lawsuit against then-Attorney General John Ashcroft and the U.S. Justice Department (DOJ) for retroactively classifying information related to whistleblower Edmonds' allegations of wrongdoing in an FBI translation unit. In February, 2005 the Justice Department backed down on the lawsuit, essentially affirming that the it could not defend its position with regard to the illegal classification.[25]

The suit alleged that the retroactive classification was unlawful and violated POGO's First Amendment right to free speech. The information at issue was presented by the FBI to the Senate Judiciary Committee during two unclassified briefings in 2002. The information was referenced in letters from U.S. Sens. Patrick Leahy (D-VT) and Charles Grassley (R-IA) to DOJ officials. The senators' letters were posted on their web sites but were removed after the FBI notified the Senate in May 2004 that the information had been retroactively classified. During a June 2004 Senate Judiciary Committee hearing, then-Attorney General Ashcroft defended the decision to retroactively classify the information, claiming that its further dissemination could seriously impair the national security interests of the United States, even though for more than two years the information was widely available to the public.

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[24] Amey, Scott, "Letter to Homeland Security Secretary Tom Ridge on DHS's Management Directive on FOUO Information," Project On Government Oversight, January 25, 2005. http://www.pogo.org/p/government/gl-050101-dhs.html Retrieved April 27, 2005.

[25] Project On Government Oversight, "Justice Department Caves In: Allows Publication of Retroactively Classified Information,"February 22, 2005, http://www.pogo.org/p/government/ga-050202-classification.html.

Another area of particular concern has been the increased use of the state secrets privilege in cases involving whistleblowers. The state secrets privilege may be invoked by the Executive Branch in legal proceedings to assert that information must be protected for national security reasons. The American Civil Liberties Union and the Center for Constitutional Rights are both engaged in litigation concerning the abuse of the state secrets privilege to hide government wrongdoing.

Anecdotally, the cases of several national security whistleblowers have been publicized in recent years whose cases were essentially shut down by the government's invocation of the state secrets privilege. According to William G. Weaver and Robert M. Pallitto at the University of Texas at El Paso:

> "Use of the state secrets privilege in courts has grown significantly over the last twenty-five years. In the twenty-three years between the decision in Reynolds and the election of Jimmy Carter, in 1976, there are four reported cases where the government invoked the privilege. Between 1977 and 2001, there are a total of fifty-one reported cases where courts ruled on invocation of the privilege."[26]

State secrets privilege abuses add to the list of tools the Executive Branch has at its disposal for silencing whistleblowers.

Under Assault: Communication with Congress

The free flow of information from government employees to Congress enables the Congress to fulfill its duty of overseeing the Executive Branch. Congress' right to information from the Executive Branch is recognized as "clear and unassailable."[27] As the Congressional Research Service noted: "The Supreme Court has on numerous occasions expressly recognized Congress' inherent right to receive information from executive agencies in legislative oversight or investigations, so as to gather knowledge and information 'concerning the administration of existing laws as well as proposed or possibly needed statutes,' a process deemed to be essential to the legislative function."[28]

In order to assert its unassailable right to oversee the government, Congress has, since 1988, approved provisions in annual appropriations bills that prohibit managers from silencing government whistleblowers. Known as "anti-gag statutes," the provisions prohibit government agencies from spending funds to prevent employees from public communication, including with Congress. For example, agencies are not allowed to spend funds to force employees to sign nondisclosure agreements. These free speech rights are protected under both the Whistleblower Protection Act and

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[26] Weaver, William G. and Robert M. Pallitto, "State Secrets and Executive Power," University of Texas at El Paso.

[27] Congressional Research Service, Memorandum, "Agency Prohibiting a Federal Officer from Providing Accurate Cost Information to the United States Congress," April 26, 2004.

[28] Congressional Research Service, "Memorandum: Agency Prohibiting a Federal Officer from Providing Accurate Cost Information to the United States Congress," April 26, 2004.

the Lloyd-La Follette Act of 1912. The Lloyd-La Follette Act was originally embraced by Congress in response to executive order "gag rules" from Presidents Theodore Roosevelt and Howard Taft.

Despite the clarity of the law and the courts' interpretation of congressional powers, several extraordinary abuses have taken place in recent years. One example concerned investigations by Senator Grassley into a Department of Energy program to compensate nuclear workers who became ill as a result of the production and testing of nuclear weapons. According to Al Kamen's February 6, 2004, "In the Loop" column in the *Washington Post*, Beverly Cook, an assistant secretary in the Department, issued an email to employees which stated:

> "No information is to be given to OMB, the press or to congressional offices without my direct approval regardless of the subject matter."[29]

This email clearly illegally violated the free speech rights of employees to communicate with Congress and the public.

A more highly publicized event concerned the silencing of the Centers for Medicare and Medicaid Services Chief Actuary Richard S. Foster on the cost of the Medicare prescription drug plan. According to the Government Accountability Office, Thomas A. Scully, the former Administrator of the Centers for Medicare and Medicaid Services, threatened "to terminate his [Foster's] employment if Mr. Foster provided various cost estimates of the then-pending prescription drug legislation to members of Congress and their staff." Both the Congressional Research Service and the Government Accountability Office issued legal opinions finding that the effort to silence Foster was unlawful.[30] (Appendix D)

Unfortunately, the "anti-gag statute" is subject to annual approval by the Congress. Whistleblower advocates have warned that the statute's year-to-year existence makes the protections it provides fleeting. In the 108th Congress, reformers proposed making the anti-gag statute permanent in the Federal Employees Protection of Disclosures Act (S. 2628) and the Whistleblower Protection Enhancement Act (H.R. 3281), which were unanimously approved by the Senate Governmental Affairs Committee and the House Government Reform Committee. (Appendix E) However, neither the Senate nor the House scheduled votes on the legislation. In 2005, the Federal Employees Disclosure Act was reintroduced in the Senate as bill number S. 494.[31]

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[29] Kamen, Al, "Buck Slips," *Washington Post*, February 6, 2004. p A23.

[30] Government Accountability Office, "Department of Health and Human Services – Chief Actuary's Communications with Congress B-302911," September 7, 2004. http://www.gao.gov/decisions/appro/302911.htm. Retrieved October 6, 2004; and Congressional Research Service, "Memorandum: Agency Prohibiting a Federal Officer from Providing Accurate Cost Information to the United States Congress," April 26, 2004.

[31] Information about the Federal Employee Protection of Disclosures via Govexec.com's Bill Tracker http://capwiz.com/govexec/issues/bills/?bill=7409391&size=full. Retrieved April 26, 2005.

Separate but Unequal: Federal Bureau of Investigation

Since the creation of whistleblower protections in the 1978 Civil Service Reform Act, the Federal Bureau of Investigation (FBI) has operated under a situation which can only be called separate and unequal. The Bureau persuaded the Congress to exempt it from protections extended to all other civil service employees. However, Congress did require the Attorney General "to prescribe regulations to ensure that such [whistleblower] reprisal not be taken," and required the President of the United States to enforce those regulations.[32] Congress also mandated that FBI whistleblower protections be "consistent with the applicable provisions of" the Whistleblower Protection Act.[33]

The FBI managed to disregard Congress' order until 1997. In April 1997, because of the highly-publicized case of FBI crime-lab whistleblower Dr. Frederic Whitehurst, President Bill Clinton issued a "Memorandum for the Attorney General" which directed that the Attorney General "establish appropriate processes" to implement the Whistleblower Protection Act for FBI employees.[34]

However, the regulations, which were finalized in 1999, failed to meet the standards provided under the Whistleblower Protection Act. FBI whistleblowers were afforded the right to have their alleged reprisals investigated by the FBI Office of Professional Responsibility and they could also appeal their reprisal cases to the Deputy Attorney General.[35] But they were not given the right other civil service employees have for an independent third party such as the Merit Systems Protection Board or the courts to hear and adjudicate their appeal, or even for the Office of Special Counsel to investigate and prosecute.[36] They also were not afforded the right to have their cases investigated by the Department of Justice's Inspector General (DOJ IG), unless the Deputy Attorney General or Attorney General approved.[37]

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[32] 28 C.F.R §27 Regulations for Whistleblower Protection for FBI Employees. http://www.fas.org/sgp/news/1999/11/fbiwhist.html. Retrieved April 27, 2005.

[33] Title 5 U.S. Code Section 2303, "Prohibited Personnel Practices in the Federal Bureau of Investigation" http://uscode.house.gov/uscode-cgi/fastweb.exe?getdoc+uscview+t05t08+180+0++%28%29%20%20AND%20%28%285%29%20ADJ%20USC%29%3ACITE%20AND%20%28USC%20w%2F10%20%282303%29%29%3ACITE%20%20%20%20%20%20%20%20%20%20. Retrieved April 27, 2005.

[34] Testimony of Stephen M. Kohn, attorney for Dr. Frederick Whitehurst before the Senate Judiciary Committee, May 12, 1997. http://www.globalsecurity.org/security/library/congress/1997_h/h970513w.htm Retrieved April 26, 2005.

[35] 28 C.F.R §27 Regulations for Whistleblower Protection for FBI Employees. http://www.fas.org/sgp/news/1999/11/fbiwhist.html. Retrieved April 27, 2005.

[36] Statement of Michael R. Bromwich, Inspector General, U.S. Department of Justice before the House Permanent Select Committee on Intelligence concerning H.R. 3829: The Intelligence Community Whistleblower Protection Act of 1998, June 10, 1998. http://www.fas.org/irp/congress/1998_hr/ts061098.htm. Retrieved April 27, 2005.

[37] Department of Justice Inspector General Special Report, "A Review of the FBI's Response to John Roberts' Statements on 60 Minutes ," February 2003. http://www.usdoj.gov/oig/special/0302/index.htm. Retrieved October 1, 2004.

The memo from President Clinton also directed the FBI to report on its whistleblower cases annually:

> "Not later than March 1 of each year, the Attorney General shall provide a report to the President stating the number of allegations of reprisal received during the preceding calendar year, the disposition of each allegation resolved during the preceding calendar year, and the number of unresolved allegations pending as of the end of the calendar year."[38]

Repeated attempts by the National Whistleblower Center to acquire this memo under the Freedom of Information Act (FOIA) have failed, indicating that the memo likely does not exist. Most recently, in 2003, the Bureau responded to the Center's FOIA request with a "no records responsive" answer.

In 2001, after a series of oversight hearings on the FBI, Senators Charles Grassley (R-IA) and Patrick Leahy (D-VT) were no longer content to allow the FBI to "police themselves," and introduced legislation giving the Department of Justice Inspector General expanded jurisdiction over FBI whistleblower cases. In response, then-Attorney General Ashcroft agreed to institute the policy.[39]

In 2002, Senators Grassley and Leahy introduced the FBI Reform Act, which sought, among other things, to give the Merit Systems Protection Board and the Office of Special Counsel jurisdiction to investigate and hear FBI cases, as it does for other agencies. Under the Act, FBI whistleblowers would, for the first time, have access to an independent arbiter to hear their case, and to the courts. Although it was unanimously approved by the Judiciary Committee, the FBI Reform Act never reached the Floor of the Senate because it was subjected to an anonymous hold by another Senator.[40] The legislative history of the bill provided context to the Committee's sentiment that more accountability was needed:

> "The FBI's critical and growing responsibilities make it all the more necessary to confront the serious weaknesses in the Bureau's management and operations that have come to light in recent years. In the 1990s the tragic violent confrontations at Ruby Ridge and Waco, and subsequent flawed internal investigations, led to further inquiries, including an independent investigation of Waco events by former Senator John Danforth, that exposed failures of FBI officials to be candid in admitting errors.

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[38] Title 5 U.S. Code Section 2303, "Prohibited Personnel Practices in the Federal Bureau of Investigation" http://uscode.house.gov/uscode-cgi/fastweb.exe?getdoc+uscview+t05t08+180+0++%28%29%20%20AND%20%28%285%29%20ADJ%20USC%29%3ACITE%20AND%20%28USC%20w%2F10%20%282303%29%29%3ACITE%20%20%20%20%20%20%20%20%20%20. Retrieved April 27, 2005.

[39] "Leahy, Grassley, Applaud Justice Department Move on FBI Oversight," July 11, 2001. http://leahy.senate.gov/press/200107/010711.html. Retrieved April 27, 2005.

[40] Statement of Senator Patrick Leahy, "Reaction Of Sen. Patrick Leahy (D-Vt.), Ranking Member, Senate Judiciary Committee, To The DOJ Inspector General's Report On The Double-Standard Of Discipline Within The FBI," November 13, 2003. http://leahy.senate.gov/press/200311/111303.html. Retrieved April 27, 2005. NOTE: In the Senate a member may secretly prevent legislation from coming up for a vote.

> Highly publicized investigative mistakes in the Atlanta Olympics bombing case and the Wen Ho Lee espionage investigation raised questions about the competence and judgment of FBI officials.
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> This bill stems from the lessons learned during a series of Committee hearings on oversight of the FBI from June 2001, through April 2002, including hearings on the Webster Commission review of FBI security in the wake of the Hanssen espionage case and the Justice Department Inspector General's report on the belated FBI disclosure of documents in the Oklahoma City bombing case."[41]

In 2003, the FBI Reform Act was re-introduced in the House and the Senate, but did not pass.[42] As recently as July 2004, Senators Grassley and Leahy expressed concern that the FBI launches a retaliatory "probe every time an agent speaks publicly about problems within the FBI."[43]

Left Behind: Intelligence Agencies

Employees working at intelligence agencies have been excluded from protections under the Whistleblower Protection Act, including "the Central Intelligence Agency, Defense Intelligence Agency, National Security Agency, and certain other intelligence agencies excluded by the President."[44]

The case of Navy whistleblower Carol Czarkowski illustrates how intelligence agency exclusions can be abused. After Czarkowski filed her Whistleblower Protection Act complaint and the Navy failed to get her case dismissed, it retroactively declared her ineligible for protection under the law because her office was designated an "intelligence agency."[45] Members of the Senate have observed that the ability to invoke the intelligence agency exemption *ex post facto* is problematic, noting that the Navy sought the exemption "over a year into whistleblower litigation" and only "after

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[41] Senate Judiciary Committee Report 107-148 "The Federal Bureau of Investigation Reform Act of 2002," May 10, 2002. http://thomas.loc.gov/cgi-bin/cpquery/?&db_id=cp107&r_n=sr148.107&sel=TOC_6205&. Retrieved April 27, 2005.

[42] Federal Bureau of Investigation Reform Act of 2003, H.R. 2867/S. 1440.

[43] Senator Chuck Grassley Press Release "Senators Concerned about More Alleged Problems at FBI's Office of Professional Responsibility," July 14, 2004. http://grassley.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=15&Month=7&Year=2004. Retrieved April 27, 2005.

[44] Office of Special Counsel, "The Role of the U.S. Office of Special Counsel," http://www.osc.gov/documents/pubs/oscrole.pdf Retrieved April 27, 2005.

[45] U.S. Merit Systems Protection Board Opinion and Order, *Czarkowski v. Department of Navy,* July 7, 2003. http://www.mspb.gov/decisions/2003/czarkowski_dc990547b1.html. Retrieved April 27, 2005.

the [Merit Systems Protection] Board rejected an earlier effort to avoid litigation on a different basis."[46] Czarkowski appealed her case and won the case in the Federal Circuit Court. Five years after being fired and filing her initial complaint with the Office of Special Counsel, Czarkowksi is only now headed toward legal proceedings that will deal with the merits of her case.

Through the Intelligence Community Whistleblower Protection Act of 1998, Congress asserted that it had the right to receive classified information from whistleblowers working for intelligence agencies in the case of "serious or flagrant" problems. However, Congress failed to provide a legal remedy for the whistleblower. The Act allows an Inspector General to investigate whistleblower retaliation. This option was already available prior to the Act and, as a result, the protections are an empty promise at best. According to one official, in the past ten years, only a dozen whistleblowers at the Pentagon ever invoked protection under the Intelligence Community Whistleblower Protection Act.

Left Behind: Baggage Screeners

Also left behind are 45,000 Transportation Security Administration (TSA) airport baggage screeners, comprising one-fourth of the Department of Homeland Security's total personnel. Post-9/11, the public and Congress were justifiably concerned about the quality of our baggage screeners who are on the front lines of our nation's airports. When TSA was moved into the Department of Homeland Security, leaders in Congress believed that the screeners it employs would receive protections under the Whistleblower Protection Act.[47]

However, due to an unforeseen loophole, the full promise of these protections has not yet been met. Prior to moving into the Department of Homeland Security, TSA reached an agreement that allows for an independent investigation and report of findings to be conducted by the U.S. Office of Special Counsel (OSC).[48] This agreement allows the OSC to make non-binding recommendations to the TSA for ending retaliation. This agreement is hollow. Unlike under the Whistleblower Protection Act, neither the OSC nor the screeners are able to go to the Merit Systems Protection Board or the court to have the investigative findings enforced.

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[46] Senate Report 107-349 "To authorize appropriations for the Merit Systems Protection Board and the Office of Secial Counsel, and for other purposes, to accompany S. 3070," November 19, 2002. http://thomas.loc.gov/cgi-bin/cpquery/0?&&dbname=cp107&&&r_n=sr349.107&&sel=DOC&. Retrieved April 27, 2005.

[47] Peckenpaugh, Jason, "Homeland Security employees will retain whistleblower rights," Govexec.com, November 20, 2002. http://www.govexec.com/dailyfed/1102/112002p1.htm. Retrieved April 27, 2005.

[48] " Memorandum of Understanding Between the U. S. Office of Special Counsel (OSC) and the Transportation Security Administration (TSA) Regarding Whistleblower Protections for TSA Security Screeners," May 28, 2002. http://www.osc.gov/documents/tsa/tsa_mou.htm. Retrieved April 27, 2005.

On May 6, 2004, the OSC urged the Merit Systems Protection Board to extend Whistleblower Protection Act protections to airport screeners, arguing that the 2002 Homeland Security Act was the controlling legal authority rather than the 2001 law creating the Transportation Security Administration. Special Counsel Scott Bloch stated: "When Congress created the Department of Homeland Security, they made it clear that whistleblower protection is an integral part of protecting homeland security. Providing full whistleblower protections to screeners will help ensure that Congress's goals in establishing DHS are realized."[49] The Board disagreed in an August 2004 ruling, saying that "Board jurisdiction over Screeners'... is not found in the HSA [Homeland Security Act]."[50] As a result, only Congress can take action to extend to screeners the same protections that all other Department of Homeland Security employees enjoy.

Left Behind: Private Sector Whistleblowers

A 2002 report White House report on the creation of the Department of Homeland Security underscored the fact that the private sector plays a significant role in protecting the public from terrorist attacks. The report notes that "terrorists are capable of causing enormous damage to our country by attacking our critical infrastructure – those assets, systems, and functions vital to our national security, governance, public health and safety, economy, and national morale." It went on to say that "approximately 85 percent of our nation's critical infrastructure" is owned by the private sector.[51] In addition, since 9/11, the federal government has entered an unprecedented era of privatization. Private companies are doing more and more of the government's work.

In several instances, Congress has noted the need to protect whistleblowers in the private sector who expose legitimate public safety and security concerns. The most significant legislation was the Sarbanes-Oxley Act which provided protections for whistleblowers at publicly-traded companies concerning issues that might affect the value of companies stocks. This legislation is a model that should be applied across the board to all private companies for all disclosures of misconduct. Unfortunately, whistleblower protection programs for private sector workers are the exception to the rule. Legislation proposed in Congress, called the Paul Revere Freedom to Warn Act, would have extended protections to all private sector workers (as well as federal employees) who communicate homeland security weaknesses to Congress, but the legislation failed to pass.[52]

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[49] U.S. Office of Special Counsel, "Office of Special Counsel Files Friend of Court Brief Supporting Full Whistleblower Protections for Transportation Security Administration Screeners," May 24, 2004. http://www.osc.gov/documents/press/2004/pr04_08.htm. Retrieved October 1, 2004.

[50] Merit Systems Protection Board ruling, *Schott, Jiggetts, Younger v. Department of Homeland Security*, August 12, 2004. http://www.mspb.gov/decisions/2004/schott_dc030807w1.html. Retrieved April 27, 2005.

[51] Department of Homeland Security, The White House, "Information Analysis and Infrastructure Protection," June 2002. http://www.whitehouse.gov/deptofhomeland/sect6.html. Retrieved October, 1, 2004.

[52] The Paul Revere Freedom to Warn Act, H.R. 3806, 107th Congress , February 27, 2002.

Nuclear Contractors & Licensees. Under Section 211 of the Energy Reorganization Act (ERA), private sector nuclear workers can file a complaint with Department of Labor to investigate their whistleblower allegations. Employees working for licensees, applicants for licenses, contractors or subcontractors of the Nuclear Regulatory Commission are covered. Also covered are contractors or subcontractors of the Department of Energy that are "indemnified by the Department under section 170 d. of the Atomic Energy Act of 1954 (42 U.S.C. 2210(d)), but such term shall not include any contractor or subcontractor covered by Executive Order No. 12344."[53] The provision does not cover government employees who work for the Nuclear Regulatory Commission or the Department of Energy.

According to the Senate report on the law: "The Secretary of Labor would investigate such charges and issue findings and a decision which would be subject to judicial review. If the Secretary should find a violation, he would issue orders to abate it, including, where appropriate, the rehiring of the employee to his former position with back pay. Also, the person committing the violation could be assessed the costs incurred by the employee to obtain redress."

However, the appeal process for ERA whistleblower cases leads into administrative proceedings at the Department of Labor where cases can languish for months and even years. (For example, Hanford whistleblower Casey Ruud's case has taken 14 years and is still ongoing.) This situation makes it difficult for whistleblowers to obtain timely relief. As a result, there is enormous pressure on most ERA whistleblowers to settle their cases, rather than fight to the end.

Compounding this problem is the fact that the Department of Energy has been paying hundreds of millions of dollars to contractors for their litigation costs in whistleblower cases. As a result, contractors have a strong incentive to drag out legal proceedings and refuse to settle since their legal bills are paid by the government. One of the most egregious cases of this occurred in March 2005 when a California jury awarded Lawrence Livermore National Laboratory whistleblower Dee Kotla $2.1 million. She was reportedly fired primarily for making a $4.30 personal phone call "because she was going to be a witness in a sexual-harassment case against the nuclear weapons lab" which is run by University of California. This was the second time the Lab had lost on the case, yet it announced it would be appealing the case a third time after this verdict. According to one report, the Kotla case was estimated to cost the taxpayers $9 million.[54]

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[53] Energy Reorganization Act, 42 U.S.C. § 5851 Employee Protection. http://www.oalj.dol.gov/public/wblower/refrnc/42u5851.htm. Retrieved October 1, 2004.

[54] Hoffman, Ian, "Jury awards whistleblower $2.1 million: Lab operators express disappointment in verdict, claiming actions were merited," *Tri-Valley Herald* and other news outlets, March 24, 2005. http://www.insidebayarea.com/trivalleyherald/localnews/ci_2620321 Retrieved April 26, 2005.

The Kotla case and other cases that have drawn attention to the University of California which uses its taxpayer-funded war chest to challenge virtually every verdict and award for whistleblowers. In 2005, Representative Ed Markey (D-MA) prevailed in convincing the House of Representatives to include language in the energy bill that would deny reimbursements to contractors for legal costs when they lose on the merits of the case.

Congress recently recognized the problem of the Department of Labor case backlog when it passed whistleblower protections for corporate workers under the Sarbanes-Oxley Act. Under that law, whistleblowers can proceed to court for a jury trial if the Department of Labor fails to rule on their case in 180 days. A similar fix on the ERA would make it a much more functional source of protection for nuclear workers.

Problems and Solutions

Congress has frequently considered whistleblower protection policy reforms. However, many of those reforms only create a process for the whistleblower to report wrongdoing internally at their agency. Internal reporting and investigations frequently result in the government correcting whatever problems or corruption have occurred. However, they fail to provide meaningful results for whistleblowers who, in many cases, have had their careers destroyed. Those who retaliate against whistleblowers are rarely held accountable for their actions. Even when a whistleblower was right, they are rarely compensated for the loss of their job, income or security clearance. The following problems and solutions are aimed at creating legal processes and remedies that make the whistleblower's life whole again. This list of problems and solutions is not comprehensive but designed to draw attention to some of the most important gaps in the whistleblower patchwork of protections.

PROBLEM: The Whistleblower Protection Act (WPA) is Broken. The Federal Circuit Court, which has a monopoly over judicial review of WPA cases, has defied Congressional intent to protect whistleblowers through its rulings. This court has played the lead role in unraveling the WPA three times, forcing Congress to repair the act in 1989, 1994, and today. The WPA limits whistleblower appeals to this one Court, which has had a history of hostility towards whistleblowers. Since Congress strengthened the WPA ten years ago, the Court has ruled on the merits in favor of whistleblowers only once out of 96 cases. Moreover, the judicial review afforded WPA cases is inconsistent with other government and corporate whistleblower protection statutes. Finally, whistleblower cases can get trapped for years at the Office of Special Counsel which is tasked with intervening on behalf of whistleblowers. In recent years, OSC has been notoriously overdue on handling cases.

"Real" Whistleblower Protections

✦ Normal access to courts including trial by jury.
✦ Protection for any lawful disclosure challenging misconduct betraying the public trust
✦ Prompt resolution of the case.
✦ Interim relief while the case is pending.
✦ Protection for those who reasonably believe that wrongdoing has occurred.
✦ Reasonable requirements for qualifying for protection.
✦ Genuine victories that stop retaliation and make the whistleblower "whole."
✦ Findings that retaliation is illegal and accountability for those who engage in it.
✦ Effective resolution of the problem the whistleblower has brought to light.

SOLUTION: All Circuits Review. By giving WPA cases normal appellate court review, Congress will be allowing whistleblowers to appeal to courts in places in which they live. Congress will also be allowing courts across the country to interpret the law, which could prevent it from being undermined in the future.

SOLUTION: Close Loopholes. Through legislation, Congress must repeat its intent that employees are covered when they report wrongdoing in any context, including: 1) To their boss or in the chain of command; 2) To co-workers or those suspected of wrongdoing; 3) That challenges policies; 4) As a part of their job duties; and 5) After someone else has reported it.

SOLUTION: Create A Free Market of Legal Options. If a whistleblower's case is not handled in a timely way by the Office of Special Counsel, the whistleblower should be allowed the option of taking his or her case to the courts for a trial by jury. This ensures that if for some unforeseen reason the Office of Special Counsel is unable to process cases, the whistleblowers have other legal options. Congress subscribed to this principle in the last piece of major whistleblower legislation that it passed in the Sarbanes-Oxley Act which allows whistleblowers to go to court if the Department of Labor fails to handle their claim in 180 days. Representative Edward Markey has authored legislation that will be introduced in 2005 that will enable this option.

PROBLEM: National Security Clearance Retaliation is Not Covered. Taking away an employee's security clearance has become the weapon of choice for wrongdoers who retaliate. When a security clearance is revoked, the employee is effectively fired since they are unable to do their job or pursue other job opportunities in their area of expertise. Currently, the employee is unable to appeal to an independent body to challenge the retaliation. Internal hearings are Kafkaesque: Whistleblowers are not told the charges against them, and not allowed to dispute those charges.

SOLUTION: Independent Review. Give employees the opportunity to have a fair hearing by an impartial body that can rule on whether the security clearance revocation is retaliatory, and require its restoration. Pending legislation in the Senate, the Federal Employees Disclosure Act (S. 494) would accomplish this goal.[55] Inspectors General at intelligence agencies outside the Pentagon should consider implementing the model the Defense Department Inspector General has created for investigating security clearance retaliation.

PROBLEM: The Office of Special Counsel is Dysfunctional. The Office of Special Counsel has been engulfed in controversy for the past year. Government Accountability Office data from 2004 show that only 1/4 of whistleblowers seeking help from the agency even had their cases processed in the timelines set by Congress.

SOLUTION: Congressional Oversight Hearings and Legal Alternatives. The Senate Homeland Security and Governmental Affairs Committee has pledge to have hearings in 2005 on the Office of Special Counsel. Congress should conduct a top to bottom review of the Office of Special Counsel's handling of whistleblower cases. Both the Senate and the House should pledge to have hearings at least annually, if not more, to oversee the Office of Special Counsel and make sure that it is truly fulfilling its mission of protecting whistleblowers in a timely way. In addition, Congress should create legal alternatives for whistleblowers so that their cases do not become trapped at the agency (see above under "Create A Free Market of Legal Options").

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[55] Information about the Federal Employee Protection of Disclosures via Govexec.com's Bill Tracker http://capwiz.com/govexec/issues/bills/?bill=7409391&size=full. Retrieved April 26, 2005.

PROBLEM: Communication with Congress under Assault. Congress' ability to receive information from federal employees is crucial to its legislative and oversight responsibilities. However, government agencies continually attempt to stem the flow of information to Congress primarily by requiring government employees to sign non-disclosure forms. Since 1988, Congress has annually passed legislation attached to appropriations bills known as "anti-gag statutes" which prevent agencies from paying salaries of managers who attempt to prevent subordinates from communicating with Congress. Despite this, employees who communicate with Congress and are retaliated against have no way to challenge that retaliation or enforce their right to provide information to Congress.

> **SOLUTION: Make Anti-Gag Statutes Permanent.** The principle of unfettered communication from the Executive Branch should not be vulnerable to an annual and unpredictable decision. Pending legislation in the Senate, the Federal Employees Disclosure Act (S. 494) would accomplish this goal for civil service employees covered under the Whistleblower Protection Act.

> **SOLUTION: Provide Remedies for Whistleblowers and Criminalize Retaliation.** Allow federal employees who are retaliated against for communicating with Congress to have their fair day in court. Should be allowed to have a jury trial and potential emergency relief to maintain the flow of information for Congressional oversight. In addition, Congress should create criminal or civil penalties for those who defy the right of whistleblowers to communicate with Congress.

PROBLEM: The FBI and Intelligence Agencies Left Behind. Despite Congress mandating that the FBI institute whistleblower protections "consistent" with the Whistleblower Protection Act, the FBI has failed to do so. Today, there is no independent administrative or judicial review of FBI cases. In 1998, Congress asserted that it had the right to receive classified information from whistleblowers at intelligence agencies in the case of "serious or flagrant" problems under the Intelligence Community Whistleblower Protection Act. However, Congress failed to provide a remedy for whistleblowers who are retaliated against, making any Congressional "right" and employee protection meaningless.

> **SOLUTION: Apply Meaningful Whistleblower Protections to the FBI and Intelligence Agencies.** These whistleblowers should be allowed the right to an independent review outside the agency as is afforded other civil service employees. Making these whistleblowers eligible for protection under the Whistleblower Protection Act would be one way to accomplish this goal. Classified information can remain protected in legal proceedings through redactions and excisions.

PROBLEM: TSA Airport Baggage Screeners Left Behind. Through a glitch, airport baggage screeners, who comprise 1/4 of the total employees of the Department of Homeland Security, were excluded from the Whistleblower Protection Act rights afforded all other employees of the Department.

SOLUTION: Apply the Whistleblower Protection Act to TSA Airport Baggage Screeners. There is no reason why these employees should be treated any differently than other civil service employees.

PROBLEM: Private Sector Whistleblowers Left Behind. Approximately 85% of the nation's critical infrastructure needing homeland security protection is owned by the private sector. More and more of the government's work is being privatized and done by contractors. The vast majority of private sector national and homeland security whistleblowers are not protected.

SOLUTION: Apply Sarbanes-Oxley Protections Across Private Sector. Allow homeland and national security whistleblowers at all private sector companies to have the same protections as financial misconduct whistleblowers at publicly-traded companies. Whistleblowers should have access to the courts to seek legal remedies.

SOLUTION: Stop Reimbursing Contractor Legal Fees in Whistleblower Cases. Congress should change the Department of Energy's policy of reimbursing contractors for legal fees in fighting whistleblower cases. This policy has encouraged frivolous litigation against whistleblowers.

Mr. SHAYS. Thank you very much.
Mr. Devine.

STATEMENT OF THOMAS DEVINE

Mr. DEVINE. Thank you for inviting my testimony, and thanks for the first congressional hearings in over a decade on the threat to national security whistleblowers from security clearance retaliation.

Mr. SHAYS. Is that both the House and Senate or just the House?

Mr. DEVINE. I am sorry, sir?

Mr. SHAYS. Is that both the House and Senate? Are you saying that this is the first in 12 years in either the House or Senate or in the House?

Mr. DEVINE. That is right, Mr. Chairman.

Mr. SHAYS. In both chambers.

Mr. DEVINE. Both the House and the Senate. This forum is the last step necessary for a congressional consensus on closing the security clearance loophole in the Whistleblower Protection Act. That reform is essential for America's national security. By giving whistleblowers genuine legal rights against the most common form of harassment against those who challenge security breaches—yank the whistleblower's security clearance or otherwise block access to classified information necessary to continue catching the security breaches.

There are two reasons why these actions are the harassment of choice. First, the consequences are much uglier and destructive than mere termination. Revocation brands the employee who had attempted to challenge security breaches as untrustworthy, and the whistleblower likely will be blacklisted for the rest of his or her professional life with a presumed scarlet "T" for potential traitor on his or her professional chest. Second, bureaucratic bullies get a free ride when they engage in clearance retaliation. For all practical purposes, the only limit to abuse of power is self-restraint by those considering security clearances as a weapon to retaliate.

This reform should be noncontroversial. In response to the 1990's House hearings, the House unanimously closed the security clearance loophole to the Whistleblower Protection Act in 1994, and Chairman Davis has not opposed an analogous provision which has unanimously been approved by the Senate Governmental Affairs Committee three times, most recently in S. 494. It was included in Congressman Platts' initial version of H.R. 1317. He just said that we need a GAO study to protect the record. This hearing is a far superior substitute.

Based on experience representing over 100 national security whistleblowers, GAP's primary lesson learned is that abuses of secrecy enforced by repression are a severe threat to national security because they cover up bureaucratic negligence that sustains unnecessary vulnerability to terrorism. I don't think there is any need to pile on the earlier testimony today why national security whistleblowers are America's modern Paul Reveres. They are exercising the freedom to warn, and our Nation is less safe from silencing the warnings of these front-line professionals before and since September 11th about not being prepared for terrorists and natural

disasters at our airports, our nuclear facilities, our ports, our coasts, our borders.

What are the obstacles to national security whistleblowers surviving professionally and making a difference at the same time? The bottom line for employees trying to exercise their rights against security clearance retaliation is that Kafka's "The Trial" is not just a 20th century novel. It is the 21st century reality for national security whistleblowers seeking justice. That is a strong conclusion, but it is based on fact.

Consider the following barriers: First, contempt for anti-secrecy laws. As heard, agencies openly discipline and yank the security clearances of whistleblowers by accusing them of unclassified disclosures shielded on paper under the Whistleblower Protection Act.

Second, noncompliance with the anti-gag statute. As a result, agencies disregard this law unanimously passed by Congress for the last 17 years that bans spending on agency gag orders to attempt to cancel the Whistleblower Protection Act and other good-government laws. This has even spread to Congressional Research Service staff, such as Mr. Lou Fisher, evaluating the effectiveness of national security whistleblower laws, as well as to climate change scientists, like Dr. James Hansen at NASA, trying to prevent national security threats from natural disasters.

Third, systematic conflicts of interest in enforcement of paper rights. Agency officials have and abuse unchecked authority to yank the clearances of those who blow the whistle against them. This occurred when whistleblowers challenged nuclear weapons security breakdowns. It occurred recently involving lax monitoring of leaks from 500 tons of chemical agents. You can get more information on that case study from Public Employees for Environmental Responsibility representing the whistleblowers.

Internal review boards to police anti-retaliation rights are honor systems. The agency that normally would be the institutional defendant instead is acting as the judge and jury of its own alleged misconduct. In reality, whistleblowers only have the legal right to ask an institution engaging in harassment to change its mind. Who needs a law for that?

Fourth, the twisting in the wind syndrome. Agencies have and abuse unrestrained power to suspend clearances for periods ranging from months to years without telling the employee the charges that leave them officially untrustworthy until they disprove the ghost allegations against them. Talk about a catch–22.

Fifth, internal review boards that make a caricature of due process. To illustrate in one case, after waiting 3½ years where she was assigned to her home without duties for a hearing that went 90 minutes and not a second longer, pre-Katrina emergency planning whistleblower Linda Lewis was not informed of her alleged specific misconduct, not allowed to know who made the charges against her, let alone confront her accusers, not allowed to present witnesses or the lion's share of evidence in her defense, only allowed to present her defense to a bureaucrat who couldn't make recommendations and was little more than a delivery boy forwarding a transcript, and, finally, received a decision by an anonymous three-person panel that never laid eyes on her and upheld her revocation without explanation.

Sixth, the Twilight Zone. Agencies can deny reality at will, as occurred after a Department of Justice whistleblower successfully exposed, of all issues, leaks of classified information. He was informed, when he showed up for work shortly after, he never had a clearance despite having contrary documentation and a record of handling top secret data for the previous 18 months. There wasn't anything he could do.

Seventh, inconsistent rules for disclosure and protection. National security whistleblowers at the FBI and the intelligence agencies have the right to make classified disclosures to Congress under controlled circumstances, but those at Civil Service agencies like DOE, the Defense Department, or the Department of Homeland Security do not in all cases. Most fundamentally, all rights at the FBI and intelligence agencies are honor system, compared to third-party-enforced anti-reprisal rights covering all but security clearance harassment and for other national security whistleblowers.

And, eighth, toothless channels to work within the system. The Whistleblower Protection Act disclosure channels for employees to work within the system are broken. Consider Mr. Levernier's example today, and to just add a bit to that, the Office of Special Counsel took over 2½ years to evaluate a report that took the Department of Energy less than 6 months to investigate and write. Then after conceding its blanket denials were contradicted by a dozen internal agency reports, the Special Counsel ducked the judgment call required by law whether the report passed or failed as a good-faith resolution of this national security hazard.

National security professionals are much more likely to work within the system if it is worthy of respect.

Thank you, Mr. Chairman. I have case studies to back any of these examples and can offer recommendations.

[The prepared statement of Mr. Devine follows:]

TESTIMONY OF THOMAS DEVINE

LEGAL DIRECTOR
GOVERNMENT ACCOUNTABILITY PROJECT

before the

HOUSE GOVERNMENT REFORM COMMITTEE

on

PROTECTION FOR NATIONAL SECURITY WHISTLEBLOWERS

February 14, 2006

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

Thank you for inviting my testimony today on protection for national security whistleblowers, a topic long overdue for congressional oversight. By necessity, some of the whistleblowing disclosures most significant for our nation's homeland security, as well as for our domestic freedom must come from public servants at the Federal Bureau of Investigation and intelligence agencies. Yet none of those employees have third party enforcement of their paper rights. Instead, they must depend on an honor system, in which they can ask what normally would be the institutional defendant to change its mind. Even employees at agencies covered by the merit system have no enforceable rights for the most common harassment technique against those who challenge security breaches – yank the whistleblower's security clearance or othersie block access to classified information necessary to perform the employee's job duties.

The Government Accountability Project (GAP) is a nonprofit, nonpartisan, public interest law firm that assists whistleblowers, those employees who exercise free speech rights to challenge abuses of power that betray the public trust. GAP has led campaigns to enact or defend nearly all modern whistleblower laws enacted by Congress, including the Whistleblower Protection Act of 1989 and 1994 amendments. We teamed up with professors from American University Law School to author a model whistleblower law approved by the Organization of American States (OAS) to implement its Inter American Convention Against Corruption. We have published numerous books, such as The Whistleblower's Survival Guide: Courage Without Martyrdom, and law review articles analyzing and monitoring the track records of whistleblower rights legislation. See "Devine, "The Whistleblower Protection Act of 1989: Foundation for the Modern Law of

Employment Dissent," 51 Administrative Law Review, 531 (1999); and Devine, "The Whistleblower Statute Prepared for the Organization of American States and the Global Legal Revolution Protecting Whistleblowers," 35 George Washington U. Law Review 857 (2003). On the topic for today's hearing, the Administrative Law Review shortly will be publishing an article, "Defending Paul Revere from Friendly Fire: Providing the Freedom to Warn for National Security Whistleblowers." ...

Since 1976 we have represented or personally assisted well over 100 national and homeland security whistleblowers from the Federal Bureau of Investigation (FBI) , Department of Defense (DOD), Central Intelligence Agency (CIA), National Security Agency (NSA), Transportation Security Administration (TSA), Department of Energy (DOE) and Nuclear Regulatory Commission (NRC), as well as relevant whistleblowers from associated contractors and from Offices of Inspector General (OIG) throughout the Executive branch. In a plurality of cases the reprisal of choice has been removal of the employee's security clearance, or blocking access through a myriad of other available techniques. There are two reasons why security clearance actions are the harassment of choice. First, the consequences are much uglier and destructive than mere termination. Clearance revocation brands the employee who had attempted to challenge security breaches as untrustworthy, and the whistleblower likely will be professionally blacklisted forever with a presumed scarlet "T" (for traitor) on his or her professional chest. Second, bureaucratic bullies get a free ride when engaging in clearance retaliation. For all practical purposes, the only limit to abuse of power is self-restraint by those considering security clearances as a weapon to retaliate.

Based on GAP's experience in partnerships with these national and homeland security whistleblowers, we hope to make three contributions to the record today: (1) share their vital role as modern day Paul Reveres exercising the freedom to warn, and defend America's freedom against threats from both outside and within; 2) confirm that despite paper rights these patriots are functionally defenseless against retaliation through loss of security clearance; and 3) rebut the Department of Justice's (DOJ) objections to any restriction of the Executive branch's discretionary authority over security clearance decisions.

Today's participation also sparks a sense of déjà vu. GAP represented witnesses whose testimony helped develop the record for a series of joint House Judiciary-Post Office and Civil Service Committee hearings during the early 1990's. For example, one witness who made an impression was Robert Beattie, a fireman whose clearance was revoked shortly after challenging numerous fire code violations on Air Force One. As will be discussed more fully, the record from those hearings was the foundation for House action to close the security clearance loophole in 1994 amendments to the Whistleblower Protection Act. Unfortunately, the Federal Circuit Court of Appeals frustrated that unanimous mandate by rejecting the reform as part of the law, because it was merged with a broader Senate provision that did not specifically list "security clearances" (or any other actions covered by the umbrella clause).

These hearings could help give the House a chance to finish what it started over a decade ago. They are particularly timely for pending legislation to structurally reform the Whistleblower Protection Act (WPA). Both this Committee and the Senate Committee on Homeland and Governmental Affairs have approved parallel legislation, H.R. 1317 and

S. 494. The latter extends WPA coverage to security clearance actions. The former does not. We hope the record you are creating will help earn a conference committee consensus resolution for this reform, which is essential for America's national security.

The Modern Paul Reveres

Who are "whistleblowers"? In some sense, like beauty and truth, they are in the eye of the beholder. One person's heroic Profile in Courage may be another's backstabbing turncoat. Nor is there anything magic about the term. In the Netherlands, whistleblowers are called Bell Ringers, after those who warn towns of impending danger. In other societies they are known as Lighthouse Keepers, after those who shine the light on rocks that otherwise would sink ships.

Legally, under federal civil service law they are employees who lawfully disclose information that they reasonably believe is evidence of illegality, gross waste, gross mismanagement, abuse of authority or a substantial and specific danger to public health or safety. If information's release is specifically banned by statute, or if it is classified, it can only be disclosed to the agency chief, Inspector General or U.S. Office of Special Counsel.[1]

Whatever the label, these are individuals who exercise freedom of speech in contexts where it counts the most. The most commonly recognized scenario is the freedom to protest or make accusations, where they are important agents of accountability whether bearing witness through testimony in court or Congress, or exposing cover-ups through communications with the media. They also act as modern Paul Reveres, exercising the freedom to warn about threats to the public's well-being,

[1] 5 USC 2302(b)(8) The Special Counsel is an independent office designed to safeguard the merit system within the civil service, through investigations and litigation against prohibited personnel practices that violate employee rights listed in 5 USC 2302, such as whistleblower retaliation.

before avoidable disasters occur and the only thing left is finger pointing or damage control. While this type speech is quieter and more constructive than protesting a fait accompli, it may be tolerated even less by those who betray the public trust.

In the months after 9/11, it became clear that professionals throughout the federal civil service had been warning that the nation's defenses were a bluff, at our airports, nuclear facilities, ports or borders. In the three months before 9/11, nine calls for help were from national security whistleblowers, compared to 26 intakes in the three months afterwards. They explained going public out of frustration in the aftermath, to prevent renewed tragedies. They contended that too many comfortable agency officials had been satisfied to maintain the false appearance of security, rather than implementing well-known solutions to long confirmed, festering problems.

While there have been exceptions due to political champions or media spotlights, as a rule these messengers have been silenced or professionally terminated by friendly fire from a defensive federal bureaucracy. Case studies help to illustrate how the public has been endangered by that reality. A review of their status as legal third class citizens in the civil service merit system is necessary to understand the causes for this threat to national security from within the government.

Third class legal rights

The landscape of legal rights for national whistleblowers is a professional Death Valley. The defining premise is that employees of the Federal Bureau of Investigation (FBI), Central Intelligence Agency (CIA), National Security Administration and similar offices are excluded from third party enforcement of merit system principles and rights in

Title 5 of the United States Code, which establishes personnel law for the nonpartisan, professional civil service system.[2] While the same rights exist on paper in these agencies, they are enforced through an honor system -- appeals to the same institution that normally would be the adverse party. Federal Bureau of Investigation (FBI) whistleblowers have a "separate but equal system" of in-house rights equivalent to the Whistleblower Protection Act, but there is no independent due process to enforce them.[3] The Intelligence Community Whistleblower Protection Act[4] allows Offices of Inspector General to investigate and recommend corrective action, but again there is no independent due process structure for whistleblowers to seek mandatory relief.

Even for national security employees covered under Title 5, the security clearance loophole has been the Achillees' heel of the merit system. Security clearances certifying loyalty and trustworthiness are a perquisite for an employee's access to classified information necessary to perform the duties for most sensitive positions. Removing an employee's clearance is a back door way to fire the employee without triggering normal appeal rights, because there is no third party review except for the Merit Systems Protection Board's authority to monitor compliance with internal procedures by the U.S. Merit Systems Protection Board.[5]

In 1994 amendments to the Whistleblower Protection Act of 1989, Congress thought it had closed the security clearance loophole as part of new catchall protection outlawing discrimination through "any other significant changes in duties, responsibilities

[2] 5 USC 2302(a)(2)(C).
[3] 5 USC 2303.
[4] P.L. No. 105-272, Title 7; Intelligence Authorization Act of 1999, section 501.
[5] *Department of Navy v. Egan*, 484 U.S. 518 (1988).

or working conditions."[6] In legislative history, Congress repeatedly instructed that the highest priority for protection in this broad provision was security clearance actions.[7] Nonetheless, in a 2000 decision the U.S. Federal Court of Appeals for the Federal Circuit held that the provision did not create rights, because a broad provision translated through legislative history was insufficient. The specific personnel action "security clearance" had to be listed in statutory language, not explained in legislative history.[8]

The result is that security clearances have become the harassment tactic of choice against whistleblowers. As then Special Counsel Elaine Kaplan testified at Senate hearings on S. 494,

> It is sort of Kafkaesque. If you are complaining about being fired, and then one can go back and say, 'Well, you are fired because you do not have your security clearance and we cannot look at why you do not have your security clearance, ' it can be a basis for camouflaging retaliation.[9]

Case Studies

Several representative case studies illustrate the impact of this legal minefield on national security whistleblowers directly, and the public indirectly. An illustrative recent example involved national security whistleblower Linda Lewis, a USDA employee protesting the lack of planning for terrorist and other threats to the nation's food supply. She also had been warning for over a decade that emergency planning by the Federal Emergency Management Administration (FEMA) was window dressing, and that if there were a disaster the government would be dysfunctional – prophetic warnings vindicated by Katrina. After coming forward with her charges, she was assigned to work at her

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[6] 5 USC 2302(a)(2)A)(xi).
[7] S. REP. No. 103-358, at 9-10); 140 CONG. REC. 29,353 (1994) (statement of Rep. McCloskey).
[8] 217 F.3d 1372 (Fed. Cir. 2000)
[9] *S. 995 – Whistleblower Protection Act Amendments: Hearings on S. 995 before the Subcommittee on International Security, Proliferation, and Federal Services of the Committee on Governmental Affairs*, S. Hrg. 107-160 (2001).

home for over 3 1/2 years without duties while waiting for a hearing to restore her clearance, which lasted 90 minutes – with that limit enforced to the second. Afterwards, she still had not been told the specific charges against her. She had not been allowed to confront her accusers or even know who they were, put the lion's share of her evidence on the record, or call witnesses of her own. The "Presiding Official" of the proceeding might as well have been a delivery boy. He had no authority to make findings of fact, conclusions of law, or even recommendations on the case. He could only forward the transcript to an anonymous three-person panel which upheld revocation of Ms. Lewis' clearance without comment, and without ever seeing her.[10] Ms. Lewis experienced a system akin to Kafka's The Trial,[11] only in 21st century reality, not 19th century fiction.

Ms. Lewis' experience is not unique. Senior Department of Justice policy analyst Martin (Mick) Andersen blew the whistle on leaks of classified documents that were being used as political patronage. Within days, he was told that the Top Secret security clearance he had been using for over a year had never existed. Without access to classified information, he could not do any work. Instead, he was reassigned without duties to a storage area *for classified documents*, where he spent his days reading the biography of George Washington and the history of America's Civil War.[12]

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[10] Whistleblower disclosure of Linda Lewis, U.S. Office of Special Counsel 17 October 2003; 2003 Hearings, Devine testimony, 9.
[11] Franz Kafka, *The Trial* (New York: Schocken Books Inc., 1952).
[12] U.S. Office of Special Counsel, Press Release, 12 June 1998, *OSC Seeks Stay for Whistleblower*; U.S. Office of Special Counsel, Press Release, 16 June 2001, *U.S. Office of Special Counsel Announces Martin Andersen's Selection as Recipient of Special Counsel's Public Servant Award, and Settlement of his Prohibited Personnel Practice Complaint Against the Department of Justice*; 2003 Hearings; Marci Nussbaum "Blowing the Whistle: Not for the Fainthearted," *New York Times*, 10 February 2002, 3; Devine testimony, 9-10.

Two Department of Energy (DOE) whistleblowers illustrate how security clearance reprisals are used to suppress dissent against inexcusable negligence in defending homeland security. Chris Steele is in charge of nuclear safety at the Los Alamos nuclear weapons complex. He blew the whistle on problems such as the government's failure even to have a plan against suicide airplane attacks into nuclear weapons research and production facilities at the Los Alamos Laboratory, a year after the 9/11 World Trade Center tragedy. His clearance, too, was yanked without explanation. Mr. Steele was going to the mat on this and equally serious nuclear safety breakdowns, such as secret plutonium waste site without any security or environmental protection. This occurred at the climax of a showdown with Los Alamos contractors, and involved the same DOE officials forced out a few months later in connection with credit card fraud. Without warning or specific explanation, Mr. Steele was gagged and exiled – sidelined by using the clearance action to strip all his duties and reassign him to his home for five months.[13]

Richard Levernier, the Department of Energy's top expert on security and safeguards, got the same treatment when he dissented against failure to act on repeated findings of systematic security breakdowns for nuclear weapons facilities and transportation. For example, he challenged the adequacy of plans to fight terrorists attacking nuclear facilities that were limited to catching them on the way out, with no contingency for suicide squads not planning to leave a nuclear plant they came to blow up. Mr. Levernier did not have to guess why his clearance was suspended. DOE formally charged him with blowing the whistle without advance permission. The Office

[13] Affidavit of Christopher Steele, 25 February 2003; Hertsgaard, "Nuclear Insecurity;" 2003 Hearings, Devine testimony, 10.

of Special Counsel found a substantial likelihood that his disclosures demonstrated illegality, gross mismanagement, abuse of authority, and a substantial and specific danger to public health or safety.[14] Although an OSC investigation found the harassment against Levernier was illegal retaliation under the Whistleblower Protection Act, it could not act to protect his clearance due to the loophole in current law.[15]

The harassment is not limited to security clearances. Consider the experience of Bogdan Dzakovic. Mr. Dzakovic was a senior leader on the Federal Aviation Administration's Red Team, which checked airport security through covert tests. For years the Red Team had been breaching security with alarming ease, at over a 90% rate. Mr. Dzakovic and others warned that a disastrous hijacking was inevitable without a fundamental overhaul. In response the FAA ordered the Red Team not to write up its findings, and not retest airports that flunked to see if problems had been fixed. The agency also started providing advance warnings of the secret Red Team tests. After 9/11 Mr. Dzakovic felt compelled to break ranks and filed a whistleblowing disclosure with the U.S. Office of Special Counsel, which found a substantial likelihood his concerns were well taken and ordered an investigation. The Transportation Security Administration was forced to confirm Mr. Dzakovic's charges that gross mismanagement created a substantial and specific danger to public health or safety in connection with the 9/11 airplane hijackings.

In order to strengthen national security, TSA should be taking advantage of Mr. Dzakovic's expertise and allowing him to follow through on his confirmed insights. He has a significant contribution to make in preventing another terrorist hijacking. Instead,

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[14] Letter from Elaine Kaplan, Special Counsel, U.S. Office of Special Counsel, to Richard Levernier, 25 October 2002.
[15] 2003 Hearings, Devine testimony, 10-11.

the agency has sentenced him to irrelevance. TSA reacted to national debate on Mr. Dzakovic's charges by stripping him of all his professional duties. When he asked to help train his successors, he was allowed to punch holes and staple documents for their classes. After the Special Counsel protested the example being set, TSA promised to stop wasting Mr. Dzakovic's talents. But his new assignment was to answer a local metropolitan airport's hotline phone on the graveyard shift, where he regularly communicated with self-described visitors from outer space and had to wake up a supervisor to act on any genuine problems. After further protests, the agency moved him to TSA's offices in the new Department of Homeland Security (DHS) headquarters. His next assignment was to update the old FAA telephone book so it would be current for DHS.[16]

Turning the Tide

There are encouraging signs that national security whistleblowers may be on the road to achieving genuine free speech rights. Their post 9/11 disclosures have received extensive media coverage.[17] As a constituency they are organizing as well, illustrated by

[16] Letter from Elaine Kaplan, Special Counsel, U.S. Office of Special Counsel, to the President, 18 March 2003, *U.S. Office of Special Counsel Sends Report Confirming Gross Mismanagement of FAA's Red Team, Resulting in Substantial and Specific Danger to Public Health or Safety*; Statement of Bogdan Dzakovic to the National Commission on Terrorist Attacks Upon the United States, 27 February 2002, *The Paul Revere Forum: National Security Whistleblowers Speak*; Hearings Before the Committee on Governmental Affairs, *The Federal Employee Protection of disclosures Act: Amendments to the Whistleblower Protection Act, S. 1358, S. Hrg. 108-414*, Written testimony of Thomas Devine, 7-9 (2003) (*Hereinafter* "2003 Hearings, Devine testimony").

[17] Hertsgaard, "Nuclear Insecurity;" Blake Morrison, "Agent: FAA buried lapses," *USA Today*, 25 February 2002, 1A; Blake Morrison, "Agent blew whistle 'for the American people," *USA Today*, 25 February 2002, 4A; Bill Miller, "More Help Sought for Those Who Blow the Whistle," *The Washington Post*, 28 February 2002, A21; CBS News, "Nuclear Insecurity," *60 Minutes*, 27 August 2004, www.cbsnews.com; Chris Strohm, *9/11 investigation spawns whistleblower movement*, GovExec.com, 13 September 2004, http://www.govexec.com/dailyfed/0904/091304c1.htm

newly formed organizations like the National Security Whistleblowers Coalition.[18] In the larger context, 135 nongovernmental organizations petitioned Congress to provide federal whistleblowers the same right to a jury trial available for corporate whistleblowers. The citizen groups argued, "State of the art whistleblower protection is needed just as much for government workers to protect America's families as it is for corporate workers to protect America's investments."[19]

The results are beginning to translate into legislative progress recognizing the importance of their role. For example, in 2002 when the Department of Homeland Security was created, the only civil service merit system right that retained independent enforcement was whistleblower protection.[20] In August 2005, as part of the Energy Policy Act Congress provided jury trials for employees of the Department of Energy and the Nuclear Regulatory Commission.[21] In September you and other members of the House Government Reform Committee approved jury trials for all employees covered by the Whistleblower Protection Act in a 34-1 vote for amendments to restore that law's legitimacy.[22]

The most promising chance for structural reform of national security whistleblower rights also is with legislation pending to restore and further strengthen the Whistleblower Protection Act. On April 13, 2005 the Senate Governmental Affairs and

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[18] National Security Whistleblowers Coalition, "About Us," www.nswbc.org (30 October 2005).
[19] Thomas Devine, "Paul Revere Freedom to Warn Petition for Whistleblower Protection," *New Criminologist*, 16 August 2005, http://www.newcriminologist.co.uk/grady.asp?aid=1794758418.
[20] *Establishment of Human Resources Management*, U.S. Code, vol. 5, sec. 9701(b)(3)(C); However, the Merit Systems Protection Board held that, again due to insufficient precision in statutory language, prior exclusions of merit systems rights for baggage screeners means they still do not have Whistleblower Protection Act coverage. *Schott v. Department of Homeland Security*, MSPB No. DC1221-03-0807-W-1 (slip op. Aug. 12, 2004).
[21] *Employee Protection*, U.S. Code, vol. 42, secs. 5851(a)(2)(F-G); 5851(b).
[22] Section 9, H.R. 1317; U.S. House Government Reform Committee, Press release, *GRC OKs Mail for Military in Iraq and Afghanistan, Stronger Whistleblower Protections, D.C. Property Transfer*, 29 September 2005, http://reform.house.gov.

Homeland Security Committee unanimously approved S. 494,[23] which, if enacted, would provide the following significant advances in national security free speech rights. Analogous provisions in H.R. 1317 are referenced.

1) Security Clearance Due Process

Section 1(e)(1) of the legislation formally lists security clearance related determinations as personnel actions under 5 U.S.C. 2302(a)(2)(A). Section 1(e)(3) provides merit system relief for security clearance actions. While not challenging the President's authority to take final action on clearances, S. 494 permits Board and court relief for any ancillary actions, such as termination or failure to reassign meaningful duties, which are normally available when a personnel action is a prohibited personnel practice barred under 5 U.S.C. 2302. The bill also provides for deferential agency review of any clearance action that the Board finds is a prohibited personnel practice, as well as a report to Congress on resolution of the matter.[24]

2) Classified Disclosures to Congress

Section 1(b) clarifies that classified information can be included in protected whistleblowing disclosures to congressional audiences with appropriate clearances.[25] The scope of protected speech would be narrower than for unclassified disclosures to legislators. Disclosures of alleged illegality would have to consist of "direct and specific evidence," an extra degree of proof not normally required. A new category of protected speech also is included, however: "false statement to Congress on an issue of material

[23] Senate Committee Report, 24.
[24] *Id.*, 14-18.
[25] *Prohibited Personnel Practices*, U.S. Code, vol. 5, sec. 2302 (b)(8)(B). (Under current law, the Whistleblower Protection Act applies for classified disclosures to the Special Counsel, agency Inspector General or another recipient designated by the agency head).

fact."[26] The legislation clarifies a vague mandate for unrestricted communications to Congress in an underview to 5 U.S.C. 2302(b),[27] and codifies legislative history guidance in the intelligence community whistleblower law.[28]

3) Codifying the Anti-Gag Statute

Section 5 of H.R. 1317 and Section 1(k) of S. 494 would codify and provide a remedy for what has become known as the "anti-gag" statute. Since 1988 Congress has annually passed this provision, which bans spending to implement or enforce nondisclosure policies, forms, or agreements that do not contain a qualifier notifying employees that rights in the Whistleblower Protection Act and Lloyd Lafollette Act protecting communications with Congress, inter alia, supercede any free speech restrictions.[29] The provision serves as the only barrier to the implementation of an Official Secrets Act," akin to what exists in British law. An official state secrets act would criminalize the disclosure of unclassified wrongdoing, corruption, abuse, or

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[26] Senate Committee Report, 18-20.

[27] *Id.* As provided by an underview to 5 USC 2302(b), "Nothing in this subsection shall be construed to authorize the withholding of information to Congress or the taking of any personnel action against an employee who discloses information to Congress".

[28] *Id.*

[29] *See, e.g.,* P.L. 105-277, The Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Sec. 636. The text of the anti-gag statute is as follows: "No funds appropriated in this or any other Act may be used to implement or enforce the agreements in Standard Forms 312 and 4414 of the Government or any other nondisclosure policy, form, or agreement if such policy, form, or agreement does not contain the following provisions: `These restrictions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by Executive Order No. 12958; section 7211 of title 5, United States Code (governing disclosures to Congress); section 1034 of title 10, United States Code, as amended by the Military Whistleblower Protection Act (governing disclosure to Congress by members of the military); section 2302(b)(8) of title 5, United States Code, as amended by the Whistleblower Protection Act (governing disclosures of illegality, waste, fraud, abuse or public health or safety threats); the Intelligence Identities Protection Act of 1982 (50 U.S.C. 421 et seq.) (governing disclosures that could expose confidential Government agents); and the statutes which protect against disclosure that may compromise the national security, including sections 641, 793, 794, 798, and 952 of title 18, United States Code, and section 4(b) of the Subversive Activities Act of 1950 (50 U.S.C 783(b)). The definitions, requirements, obligations, rights, sanctions, and liabilities created by such Executive order and such statutory provisions are incorporated into this agreement and are controlling.'"

illegality. The anti-gag law's presence has been effective in individual cases ranging from censorship of medical and global warming research to congressional testimony.

But the law's presence has been vulnerable to annual removal from appropriations law, and it has been a right without a remedy for gagged whistleblowers. The legislation designates agency gag orders as personnel actions and makes violating the anti-gag statute a prohibited personnel practice,[30] eligible for the Special Counsel to challenge,[31] or for an employee to use an affirmative defense in any appeal to the Merit Systems Protection Board.[32]

4) Critical Infrastructure Information Shield

Section 1(l) applies the same principle of WPA supremacy over whistleblower rights to restrictions on disclosure of Critical Infrastructure Information (CII), a new hybrid secrecy category created by Congress in the Homeland Security Act, with criminal penalties up to ten years imprisonment for unauthorized disclosure.[33] CII means information about infrastructure when "incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters"[34] That language is so broad that almost any non-classified, public Whistleblower Protection Act disclosure could be criminalized through CII designation. That was not the congressional intent, as recognized by interim Department of Homeland Security regulations that exempt CII

[30] Senate Committee Report, 14-15, 25.
[31] *Investigation of Prohibited Personnel Practices; Corrective Action*, U.S. Code vol. 5, sec. 1214.
[32] *Appellate Procedures*, U.S. Code, vol. 5, sec. 7701(c)(2)(B).
[33] *Homeland Security Act of 2002*, Public Law 107-296, (25 November 2002), 214(f).
[34] *Id.*., 2, 214(c); Senate Committee Report, 21-2, 26.

status from canceling Whistleblower Protection Act free speech rights.[35] S. 494 codifies this preliminary reprieve.

5) Ending the ex post facto national security agency loophole

Section 6 of H.R. 1317 and Section 1(f) of S. 494 would eliminate agencies from using the President's authority in the middle of a WPA lawsuit to cancel jurisdiction and extinguish the employee's merit system rights, based on working in an office whose "principal function...is the conduct of foreign intelligence or counterintelligence activities."[36] Amazingly, in one case involving Navy national security whistleblower Carol Czarkowski, the Navy invoked intelligence-gathering status to cancel her Whistleblower Protection Act access after a Merit Systems Protection Board administrative judge ordered a hearing into retaliation. It was over a year into the case.[37] To prevent that sort of sophistry from canceling whistleblower rights again, H.R. 1317 and S. 494 require that any intelligence designation must occur before an employee files a prohibited personnel practice case for it to affect any given proceeding.[38]

Rebuttal to Relevant Justice Department objections

Unfortunately, to date leadership of both chambers have refused to schedule a vote on this legislation. At the end of 2004 both House and Senate versions died, because congressional leaders would not schedule "up or down" votes after the Department of Justice objected to the legislation.[39]

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[35] 6 CFR 29.8(f).
[36] *Prohibited Personnel Practices*, U.S. Code, vol. 5, sec. 2302(a)(2)(C)(ii).
[37] *Czarkowski v. Dept. of Navy*, 87 M.S.P.R. 107 (2000), and subsequent case evolution.
[38] Senate Committee Report, 20-21, 25.
[39] Devine, "Freedom to Warn Petition."

There is no credible public policy basis for this deference to DOJ, because its objections cannot withstand scrutiny. Indeed, the ongoing DOJ position per se is an institutional insult to the legislative process, because it verbatim reiterates initial objections while ignoring changes in S. 494 and/or detailed, thoroughly researched responses in Senate Governmental Affairs Committee Reports. For every DOJ comment, the Committee either made corresponding modifications to the bill, or rebutted the Justice Department's assertions in thoroughly researched detail through a series of three Committee Reports adopted without dissent. (*See* S. 3070: S. Rep. 107-349, 107th Cong., 2d Sess,. November 19, 2002; S. 1358/2628: S. Rep. No. 108-392; S. 494: S. Rep. No. 109-72, 109th Cong., 1st Sess., May 25, 2005.) In an April 12, 2005 letter to the Senate Homeland Security and Governmental Affairs Committee, as in its Senate testimony and prior letters, Justice has not even purported to respond, reference or otherwise recognize the Committee Reports' existence.

The debate relevant for today's proceedings primarily concerns S. 494's provisions on security clearance due process. While not challenging the President's authority to take final action on clearances, S. 494 permits Board and court relief for any ancillary actions, such as termination or failure to reassign meaningful duties. These remedies are normally available when a personnel action is a prohibited personnel practice barred under 5 USC 2302. The bill also provides for deferential agency review of any clearance action that the Board finds is a prohibited personnel practice, and a report to Congress on resolution of the matter.

DOJ mischaracterizes the bill as "permitting, for the first time, the Merit Systems Protection Board and the courts to review the Executive branch's decisions regarding

security clearances." This is fundamentally, conceptually inaccurate. Under the controlling Supreme Court precedent, *Department of the Navy v. Egan*, 484 U.S. 518 (1988), it is elementary that the Board and the courts retain appellate authority to review whether agencies comply with their own rules, and order relief accordingly.

DOJ further protests that the provision is unworkable and unconstitutional through scattershot objections, specifically discussed below. Three overviews provide context, however. First, DOJ's arguments merely reiterate, without advancing, objections, sometimes to the extent of attacking the wrong bill, with outdated provisions that had been modified in response to Justice's earlier objections.

More fundamentally, since 1994 this Committee and Congress have made the public policy choice to close the merit system's security clearance loophole. The decision was not made lightly. The House held four joint Judiciary-Post Office and Civil Service Committee hearings before voting unanimously to close the security clearance loophole in the WPA. The Senate Report for 1994 amendments clearly highlighted security clearances as the primary example of the reasons for what in conference became a new category of personnel action -- "any other significant change in duties responsibilities or working conditions." 5 USC 2302(a)(2)(A)(11) As the Committee report explained in 1994, after specifically rejecting the security clearance loophole,

> The intent of the Whistleblower Protection Act was to create a clear remedy for all cases of retaliation or discrimination against whistleblowers. The Committee believes that such retaliation must be prohibited, regardless what form it may take. For this reason, [S. 622, the Senate bill for the 1994 amendments] would amend the Act to cover any action taken to discriminate or retaliate against a whistleblower, because of his or her protected conduct, regardless of the form that discrimination or retaliation may take.

S. Rep. No. 103-358, at 9-10. The consensus for the 1994 amendments explained that the new personnel action includes "any harassment or discrimination that could have a chilling effect on whistleblowing or otherwise undermine the merit system," again specifying security clearance actions as the primary illustration of the provision's scope. 140 Cong. Rec. 29,353 (1994).[40]

In *Hess v. Department of State*, 217 F.3d 1372, (Fed. Cir. 2000), however, the Federal Circuit rejected legislative history for a broad anti-harassment provision, finding it insufficient to meet the Supreme Court's requirement that Congress must act "specifically" to assert authority over clearance actions beyond review whether an agency follows its own rules. *Egan*, 484 U.S. at 530. In a real sense, S. 494 is merely a technical fix to meet Supreme Court requirements for how Congress must implement a *specific* decision it already has made to assert merit system authority over clearance actions.[41]

Third, the public policy basis for the mandate is far stronger than in 1994. As seen above, since 9/11 a long-ingrained, dangerous pattern that sustains national security breakdowns has become more visible and prevalent, with higher stakes. When their clearances are yanked, employees cannot defend themselves against retaliation in scenarios where protected disclosures are needed most -- to responsibly facilitate

[40] In 1994 Congress also codified the legislative requirement for agencies to respect due process rights in clearance actions. 50 USC 435(a)(5)

[41] The Court's problem in *Egan* with independent Board appeals on the merits for security clearance decisions could not have been more simple: "The Act by its terms does not confer broad authority on the Board to review a security-clearance determination." Id. According to the Court, the Act's terms only need to be made specific to properly give the Board this authority under the constitution. In an April 15 letter to Senator Akaka, at 6, DOJ ignored the the Supreme Court's unequivocal language in *Egan* to somehow assert, "In *Hess*, the Federal Circuit followed longstanding Supreme Court precedent, *i.e.*, *Egan*, in finding that the MSPB did not have jurisdiction to review security clearance decisions. Thus, *Hess* does not suggest the need for statutory change." This raises serious questions whether the DOJ author has read the *Hess* decision, either, which states, 217 F.3d at 1376, "The principles we draw from the [Supreme] Court's decision in *Egan* are these.... (2) *unless Congress specifically authorizes otherwise*, the Merit Systems Protection Board is not authorized to review security clearance determinations or agency actions based on security clearance determinations...." (emphasis added).

solutions and accountability for long term security weaknesses due to the government's own misconduct.

DOJ's cornerstone objection is that under *Egan*, *supra*, the President has a monopoly of power to make any and all determinations relevant for a security clearance. That premise is so conceptually inaccurate that it raises serious credibility concerns. In *Egan* the Court specifically explained that Congress may act constitutionally to enforce merit system principles in clearance actions, if it explicitly makes its intention clear to assert that authority. In *Hess* the Federal Circuit interpreted that standard to mean statutory language. DOJ's generic objection that all statutory rights or third party reviews of security clearance retaliation are unconstitutional is its own creation. It simply does not exist within *Egan*.[42]

DOJ continues by falsely asserting S. 494 would create a new burden for agencies to prove clearance actions by clear and convincing evidence, replacing the current standard that access to classified information only may be provided "when clearly consistent with the interests of national security" -- a "shockingly inconsistent" change.

The attack is shockingly misplaced. Initially, DOJ objected to the wrong bill. The "clear and convincing evidence" language it criticized was in S. 1358, an earlier version of the legislation. As the Committee Report on S. 494 explained, after considering Justice's prior objection the committee "change[d] the agency's burden to mere preponderance. We believe that such a change better preserves an agency's discretion

[42] In the FY 2001 National Defense Authorization Act, P.L. 106-398, Congress legislatively imposed its judgment call on the flip side, by banning the Executive from granting clearances to certain classes of employees, such as ex-felons, those certified as drug addicts, or those who have been dishonorably discharged from military service. 10 USC 986.

with respect to security clearance determinations, and may also be less intrusive into the agency's security clearance or classified access process." (Committee Report II, at 18).[43]

More fundamentally, S. 494 is inherently irrelevant to the merits of a clearance decision, whatever the legal standards for the agency's defense. Just as with an adverse action, review for a decision on the merits is independent from the affirmative defense of prohibited personnel practice. The Board will not receive any authority to make national security judgment calls. Rather, its authority is limited to review of clearance actions based on civil service violations within its expertise that threaten the merit system. Committee Report I, at 22.

DOJ adds that the provision is unnecessary, because it is not aware of any abusive patterns, and agency internal review boards effectively enforce fair play. There is no basis in reality for those conclusions. *Reality* is the experience of whistleblowers forced to live with that rhetoric. Consider the experience of whistleblowers bearing testimony today, and the nightmares of those whose experiences are summarized above. Obtain full disclosure of the won-loss records for employees who assert whistleblower retaliation in these for a. Gather data on the time it takes to process their cases. Delays of three years are common for employees with suspended clearances just to be informed of the charges against them.

Far from being an effective means of redress, agency internal boards have become objects of dark cynicism. That is not surprising. Inherently they have a structural conflict of interest, with the board judging the dispute while working for what also is the adverse party. That is why Congress rejected internal review boards as an acceptable enforcement mechanism for whistleblower rights in legislation creating the Department of Homeland

[43] In a June 15, 2005 letter to Senator Akaka DOJ corrected the mistake.

Security. Particularly in the national security area, objective fact-finding and credible enforcement of the reprisal ban in section 2302(b)(8) require third party review.

The Justice Department asserts that jurisdiction for an "other determination relating to a security clearance" is too vague. To a degree, the concern is well taken. The statutory language should be tightened to specify jurisdiction for any actions "affecting access to classified information." Access determinations are an independent, but parallel technique to security clearances as a virtually identical way to harass whistleblowers without redress. Technical clarification and further legislative history should make clear that security clearance reform cannot be circumvented through back door access barriers.

DOJ somehow argues that banning retaliatory investigations, section 1(e)(2), also restricts routine inquiries relevant for security. The objection flunks the oxymoron test. Routine investigations and retaliatory investigations inherently are contradictory concepts. If the inquiry is routine, by definition it is not because of protected activity and would be permissible under S. 494.

On balance, by failing to concede any legitimate role for Congress under *Egan*, DOJ by default fails to rebut that S. 494 properly carries out the *Egan* court's specific instructions how Congress may act constitutionally. The Department has provided no basis aside from its stated desire to avoid checks and balances to disrupt Congress' 1994 policy choice to outlaw security clearance reprisals. This provision meets head on the expanded repression against post 9/11 national security whistleblowers who have proved an intensified need to enforce the mandate in practice.

3. Codification and remedy for anti-gag statute.

DOJ argues that codification of the anti-gag statute should be deleted for reasons "similar" to its objections for rights against security clearance reprisals and retaliatory investigations. It states, "These sections purport to dictate and micromanage the specific content of nondisclosure agreements applicable to Executive branch employees (and contractors), in violation of the President's authority 'to decide, based on the national interest, how, when and under what circumstances particular classified information should be disclosed.'"

Justice's argument cleanly misses the point. The anti-gag statute only requires that agency gag orders are within the law as established by statutes the President has signed. When the current language was adopted in 1989, the Justice Department withdrew litigation challenging its constitutionality. Justice has not filed a new legal challenge in the sixteen years Congress has re-passed language identical to that in S. 494. Indeed, the anti-gag statute initially was passed to control abuses of blanket gag orders on unclassified information restrained through hybrid secrecy categories such as "classifiable."

Conclusion

While little has yet changed at the bottom line, there are encouraging signs. More than ever before, the freedom to warn is essential to prevent or mitigate an escalating pattern of catastrophes not only from traditional Cold War adversaries, but new dangers from terrorist organizations, threats to liberty from our own government, and perhaps from the greatest threat of all --: an increasingly angry Mother Naure.

Mr. SHAYS. Thank you.
Dr. Weaver.

STATEMENT OF WILLIAM G. WEAVER

Dr. WEAVER. Thank you, Mr. Chairman. I am happy to represent the opinions of the National Security Whistleblowers Coalition, which is an organization with membership exclusively made up of national security whistleblowers.

Last week, Mr. Porter Goss, the Director of the Central Intelligence Agency, wrote in an editorial in the New York Times that leaks cost money, leaks of national security information, they cost a lot of money, and they also cost lives, and they cost effectiveness. But what he glossed over, he glossed over the well-known and documented abuse of classification authority which is used to hamstring Congress and has been used for a long time to hamstring Congress to prevent disclosure of embarrassing information, to handicap political opponents, and to aid political friends. And it is a term, "national security information," that is so malleable, and there is a mistaken belief that national security information is somehow born, that there is not a decision made by somebody that information is national security in nature and, therefore, cannot be disclosed.

Classifiability in reality is often-times proportional to the amount of embarrassment the information will cause if it is made public.

Let me disclose some classified information to you now: January 18, 1970. That is the birth date of Sibel Edmonds. That information was protected by the state secrets privilege by the Department of Justice, was not allowed to be given in an interrogatory in a suit brought by September 11th family members, as well as the fact that she speaks Azerbaijani, Farsi, and Turkish. Not only did this information receive classification, but they managed to somehow convince a Federal judge that information would cause grave damage to the national security if it was revealed. The fact that information is abused frequently by national security and classification decisions is a well-known fact, but it is one that oftentimes is not respected or recognized by Members of Congress.

I have three points I would like to make about the current system. First, it is broken, and I think to call it "a system" is actually to give it a compliment that it does not deserve. IGs and the Office of Special Counsel are at best impotent, and at worst they are collectors of intelligence, of employees, and they act as leg breakers for the agency and enforcement mechanisms.

Even in the rare instances that they back whistleblower claims, nothing happens. In the case of Sibel Edmonds, her accusations and allegations were substantially justified by the Inspector General and no changes were made in the Federal Bureau of Investigation, and indeed, some employees were promoted. In the case of Bogdan Dzakovic, at the then-FAA, his allegations were shown to be credible by the Office of Special Counsel. Again, nothing happened there.

What we have now is a Frankenstein assemblage of good intentions, but, unfortunately, that assemblage leads to catastrophe. Oftentimes whistleblowers are lured in by the promise of protection,

and what they do is they founder on the rocks of agency culture and other activities which are designed specifically to destroy them.

The present system must be removed root and branch. You need to start over. It is not working. We have 30 years of ineffectiveness, proven ineffectiveness, and it will do no good to try and add a second story to a house that is built on a flawed substrate.

Second, Congress is unnecessarily deferent to the executive branch in matters of national security. There is an unseemly servility to the executive branch. There is a reluctance to embrace the political nature of claims of national security. Congress is constitutionally empowered to receive all information; it must turn away from nothing. It is now controlled by "the official family of the President," a phrase that has been repeated over and over again, and it seems strange to me that the humble private who has a security clearance is worthy to handle information and the clerk of Government is worthy to handle information, but Members of Congress somehow must not.

Third, the combination of deference to the executive branch and this defective system yield danger to the public. It is a simple formula. No disclosure mechanism that is protected plus undue congressional deference and servility to the executive branch equals a vulnerable citizenry. I think that we pay you to do better than that, sir. I think over 30 years we have shown that the system does not work over and over again. It is time to take it out and start over.

[The prepared statement of Dr. Weaver follows:]

Testimony of William G. Weaver

Representing the National Security Whistleblowers Coalition

House Government Reform Committee

Subcommittee on National Security, Emerging Threats and International Relations

Honorable Christopher Shays, Chairman

February 14, 2006

Dear Chairman Shays and Members of the Committee:

Thank you for the opportunity to appear before you today. My name is Bill Weaver, and I am the senior advisor to the National Security Whistleblowers Coalition (NSWBC), associate in the Center for Law and Border Studies at the University of Texas at El Paso, which is subventing my appearance, and Director of Academic Programs at the Institute for Policy and Economic Development, also at UTEP. My testimony should in no way be construed as reflecting any position or policy of UTEP.

The NSWBC is an organization made up exclusively of members who have blown the whistle in national security matters, and it is the only such organization. Our members come from diverse backgrounds and experience and average about 20 years of federal service. Few people set out to become whistleblowers, and such an intention is perhaps less common in the area of national security where employees take oaths of secrecy and are often driven by patriotism, courage, and institutional loyalty.

In 2001, in one of the first memoranda to heads of departments, President George W. Bush directed that "employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities." Whistleblowers are usually the people who take such admonitions to heart, the people who believe that the rules are there to make the government better and the people safer. Sometimes, disclosures are appreciated by managers who take their roles seriously as guardians of not only the public monies but as the first line that must apply law and constitutional principles to real life problems. But many times this is not the case, and reporting employees are retaliated against by weak administrators who operate in a culture of tolerated lawlessness.

Although administrators bear responsibility for their own actions, the greater failure is

and has been with Congress, which suffers from an institutional lack of nerve in the area of oversight of national security activities in the executive branch. Whistleblowers in non-national security settings at least have a chance to get the facts of the matter before the courts and the public, but national security whistleblowers do not have that crucial advantage. All recent presidents have asserted plenary power to control the dissemination and disclosure of classified information, the vast majority of which is classified pursuant to executive order. Rather than contesting this claim, Congress seems to have capitulated on this issue. This capitulation greatly increases the difficulty associated with executive branch oversight in national security matters. One need only review recent events for proof of that conclusion. Secrecy and claims of national security are regularly used by presidents to curtail Congress' oversight responsibilities.

These constitutionally questionable claims of executive branch plenary control over national security information are not afflictions of a particular party, but rather institutional problems; Democratic and Republican presidents alike will push to the limit, and beyond, powers that crowd out congressional oversight.

Over time, administrators as well as presidents and their advisors have pursued a strategy of secrecy to set up successive pickets against all efforts, congressional, judicial, or public to provide oversight of what agencies are doing in the name of national security. Congress' failure to counter these efforts acquiesces to presidential authority in a way clearly unintended in the Constitution. Rather than preserving its institutional power, Congress sometimes gives it up to the executive in an embarrassing display of servitude. The enemy here is not the President or a particular party, but the natural tendencies of government bureaucracy to hide embarrassing and

criminal activity, and to view congressional and judicial oversight as unwarranted intrusions into their world.

Many of our members and many people we converse with are employees of the Department of Homeland Security (DHS). These people describe an agency riddled with problems that defeat the very mission of the organization. Embarrassing issues concerning management of the Federal Air Marshal Service, incompetence in the administration of the Transportation Safety Administration, and numerous other problems indicate an agency with deep problems. Some might argue that the importance of the DHS mission requires freedom from oversight, but in fact the opposite is true: the agency charged with protecting the physical security of the nation must be guarded against natural bureaucratic tendencies to cover up mistakes and hide incompetence. Whistleblowers present one of the only means for Congress to get reliable information on these problems.

Whistleblowers provide insight into executive branch activity that cannot be achieved otherwise than through allegedly unauthorized disclosure to Congress. Congress is dependent on national security whistleblowers for information affecting the deepest, most important functions of the government. But Congress leaves in place the broken mechanisms of past attempts to provide whistleblower protection. Although inspectors general and the Office of Special Counsel are empowered to investigate allegations of wrongdoing, they are managed and populated by partisans of whatever administration is in power. In the event that an inspector general or the Office of Special Counsel comes out in support of a whistleblower, as in the cases of Sibel Edmonds and Bogdan Dzakovic, nothing happens.

Neither the FBI translation department nor the Transportation Security Administration adopted changes to address the substantiated charges of gross incompetence and malfeasance lodged by Edmonds and Dzakovic. Agencies are never made to internalize the costs of their administrators' misdeeds, and so there is little incentive to reform agency customs and practices. And apparently it is no longer even tolerable in certain government quarters for people to speak the truth about these difficulties. Louis Fisher, perhaps the most prestigious researcher at the Congressional Research Service (CRS), and a 35-year veteran of that organization, is being threatened with termination for stating the obvious: Managers in national security agencies retaliate against whistleblowers with abandon and without fear of censure. The irony of retaliating against Fisher for writing about retaliation against whistleblowers seems to be lost on CRS management.

Present proposed legislation in Congress, H.R.1317 and S.494, specifically excludes national security employees from protection, employees engaged in the most sensitive work related to citizen safety and who are most likely to observe malfeasance posing the greatest risks to our citizens and country. Explicitly excluded in S. 494 are "the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Imagery and Mapping Agency, the National Security Agency, and. . . as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities, if the determination (as that determination relates to a personnel action) is made before that personnel action." H.R. 1317 is even worse, by additionally allowing exclusion of agencies involved in "homeland security." But which types of agencies are listed is really irrelevant, since the President may exclude, under terms of either

bill, any agency even remotely affected with intelligence or law enforcement functions. This is simply unacceptable to our constituency, and continues a needless and unwise deference to executive claims of power in the national security area.

What is needed is a complete overhaul of whistleblower protection, not a Frankenstein of appendages meant to correct problems that are in fact irreparable within the confines of existing legislation. The piecemeal or "pragmatic" approach to legislative reform has been useless to national security employees. In these times, where national security is at the front of public policy concern, can we afford to leave intelligence and law enforcement whistleblowers, crucial conduits to truth, indefinitely unprotected?

The proposed legislation also unnecessarily undermines congressional constitutional authority by assuming that Congress must statutorily authorize disclosures of classified information to its members. Congress is constitutionally empowered to receive such information and any statutory "authorization" would actually weaken Congress' position. By "demoting" its constitutional power to receive information from government employees it makes itself more vulnerable to executive branch claims, especially under cases with dicta that indicate the President has plenary control of classified information. Congress has inherent authority pursuant to its oversight responsibilities to receive information of waste, fraud, and abuse, regardless of whether or not such information is classified.

Most alarming to our organization is the fact that national security employees are excluded from protection under the proposed legislation. What would appear to be the only consequential help to national security employees turns out, on closer inspection, to be toothless. The proposed legislation requires that the President must determine that a unit is exempt from

the statute *before* a personnel action is instituted if it is not one of the listed excepted agencies. But this will only encourage the President to exempt as many agencies as possible before hand to withdraw protection from potential whistleblowers in order to discourage disclosure of information embarrassing to the executive branch. The provision will result in *less* protection for whistleblowers, not more.

As the NSWBC has consistently stated, and included in our model legislation, the indispensable features to an effective whistleblower protection statute are:

1) Create a cause of action permitting whistleblowers to sue retaliators for money damages in their personal and official capacities and to bring suit against agencies in *respondeat superior* for failure to rectify misdeeds by employees or provide sufficient safeguards against whistleblower retaliation. And:

- Allow suits to be filed in U.S. District Courts
- Provide for reasonable attorneys fees recoverable from defendants for prevailing plaintiffs
- If agencies claim secrecy privileges that thwart suits, then let disputed facts covered by secrecy privileges be resolved in favor of plaintiffs. This would mirror the way factual inferences are construed against moving parties in summary judgment. At present, assertion of secrecy privileges is costless to agency administrators, and so will be used beyond legitimate grounds to protect agencies and administrators from embarrassment. Agencies must be made to internalize the costs of their instruments of secrecy when use of those instruments thwarts justice.

The law counsels that people by nature respond most readily to threats to their property or their liberty. At present administrators who engage in retaliation against employees for disclosure of waste, fraud, and abuse are virtually guaranteed to suffer no harm; they have no fear of money damages or criminal conviction. Indeed, often times these administrators are rewarded with promotion for "protecting" the agency.

2) Criminalize retaliation against whistleblowers. If administrators knowingly engage in retaliation against whistleblowers to prevent discovery of agency activity that is felonious in character, then those administrators should be subject to criminal prosecution.

3) Discontinue the office of Special Counsel and start over with something that is truly independent of executive branch vicissitudes and has not been deformed by decades of partisan politics.

In their present form, we cannot support either H.R. 1317 or S. 494. To do so would be to betray our constituency and our principles.

Presently, with both houses of Congress controlled by the party of the president, the transpartisan considerations of how to maintain the institutional integrity of Congress take a backseat to party power. This may continue to happen to the detriment of the United States and its citizens, but the wisest course of action would be to address the problem with the future security of the nation in mind, regardless of the temporary state of power of the respective parties. Thank you.

Mr. SHAYS. Thank you very much. I thank all four of you.

I am going to just ask a few questions, and then have counsel ask some questions, and then I will be asking some others. The previous panel lasted quite a long time. We had a lot of Members here asking questions. I would like to know your reaction to the first panel and what you would want to highlight for our subcommittee, for me and the staff as well. What do you think was the most important point that we learned, the most important point that was illustrated in the first panel.

Mr. ZAID. I will start over here. I would probably say the most important point or the one that we could carry away, again, goes to a lack of accountability or ability of the individual to go outside of the same decisionmakers that are reaching the decision regarding their wrongdoing or alleged wrongdoing or clearance.

Tony Shaffer, Lieutenant Colonel Shaffer, is my client as well. We provided information that not only mitigated, at least in my own opinion, but refuted specific allegations. Very quickly, one specific allegation. He was alleged to have circumvented his chain of command and gone to a General instead of talking to a Colonel on certain matters that were classified. Well, the General gave us a letter stating he had told then-Major Shaffer it was perfectly fine for him to always come to the General and that he was acting under the General's order, not only mitigated it but refuted, you know, word for word the allegation, yet——

Mr. SHAYS. This is additional information about your client. Tell me what you heard today, though, that you think was something you don't want us to miss.

Mr. ZAID. It would be a need to set up something outside of the current framework, whether that be the Federal judiciary to have oversight or some independent body. The Inspector Generals' offices, which I have dealt with most of them, are not able to handle, for a variety of reasons that are too long to go into, this type of mechanism, most of which because they are still within that same office. You saw today in your response from the CIA where it comes from Congressional Affairs rather than the Inspector General, which is supposed to be independent within that body. So it would be the ability to go somewhere independent to allow what the Executive order states should be a common-sense determination.

If you look through many of these clearance decisions and I am not even sure what the number is that actually hold clearances, but it is in the double digits, of course—publish their security clearance decisions in redacted form: the Energy Department and one portion of the Defense Department.

If you read through that, you will see that if not every single one, certainly 99 percent of them can be reached on a very commonsensical basis that would not even require some modicum level of expertise within the security field. Now, in some situations when you are dealing with SAP programs and stuff like that, sure.

Mr. SHAYS. You are losing me here.

Mr. ZAID. What I mean is the agencies will tell you this is why the judiciary does not have jurisdiction—they need expertise to make or render these types of decisions that led to the loss of those who testified—loss of the clearance who testified in the first round, and that individuals such as yourself or myself as counsel or an Ar-

ticle III constitutional judge does not have that expertise to render what the President has said should be nothing more than a common-sense determination.

If you have that type of oversight, if you have that ability to go somewhere, we wouldn't see this panel.

Mr. SHAYS. I understand now. Thank you.

Ms. Daley.

Ms. DALEY. I think I was particularly struck by the difficulties that each of the whistleblowers had to face in bringing forward information that you should know as a Member of Congress, that all of us should know in the public as well, except, of course, if it is classified and we can't know.

It is clear to me that retaliation is something that is being allowed to take place over and over again against whistleblowers, and it is mind-boggling what a silencing effect that must have on people who work inside of the executive branch who want to bring forward evidence of wrongdoing.

Mr. SHAYS. Thank you.

Before I go to you, Mr. Devine, Dr. Weaver, how many are a part of your organization?

Dr. WEAVER. How many members do we have, sir?

Mr. SHAYS. Yes.

Dr. WEAVER. We have about 75 public members, and we have members who are not public.

Mr. SHAYS. And they are all whistleblowers?

Dr. WEAVER. Yes, sir.

Mr. SHAYS. OK. Thank you.

Mr. Devine.

Mr. DEVINE. To me, the most significant points were that every one of those witnesses was a public servant who is inspiring and deserves our admiration. None of them still work for the Federal Government. The lesson learned is you can't get away with committing the truth and survive professionally. And the solution? Congress needs to get off the dime and pass the legislation to overhaul the Whistleblower Protection Act and add enforcement teeth to those paper rights so they cover all employees who need the protection against all the forms of harassment that they are hit with.

Mr. SHAYS. Mr. Devine, you have been doing this work for a while?

Mr. DEVINE. I am sorry, sir?

Mr. SHAYS. You have been doing this work for a while?

Mr. DEVINE. Oh, yes, sir, since January 1979.

Mr. SHAYS. So tell me how it becomes a political issue. I mean, it is not lost to me that we were told nothing has happened in the last 12 years. That just basically coincides pretty much with when Republicans took over. Why didn't this happen before? What was the reluctance? Has this become an ideological issue? Does this become a political issue? Does it become a power issue between the White House and Congress? Where does it break down?

Mr. DEVINE. To be fair, Mr. Chairman, I think part of the reason for delay was that up until a 1999 court decision, Members of Congress believed, with good justification, that the whistleblower law did protect against security clearance harassment. A 1999 court

ruling said that the law had been imperfectly drafted and, therefore, Congress was going to have to go back and do it right.

Since that time, the issue has been swept up with all of the other breakdowns in whistleblower law.

Mr. SHAYS. That is helpful. Thank you.

Ms. DALEY. Could I also just make a comment here?

Mr. SHAYS. Sure.

Ms. DALEY. Which is that I think this is really a question of the struggle for power between the Congress and the executive branch. This is not a partisan issue by any means.

For example, the Intelligence Community Whistleblower Protection Act, when it was passed in 1998, the Senate actually passed a much stronger version of the bill which would have required all intelligence agency employees to be made aware of the process that they should follow for using that act. Under threat of a veto from President Clinton, that was stripped out of the bill, as were some other provisions that would have made the act much stronger. So, you know, we have seen bad behavior in both parties. We have seen good behavior in both parties. I really think that this is an issue that is more about the Congress overseeing the executive branch than anything else.

Mr. SHAYS. Thank you. That is helpful to me.

Dr. Weaver.

Dr. WEAVER. Yes, I believe in the previous panel the most important thing is they all agreed that there needed to be some body independent of the Executive. Now, the Congress, of course, has a long history creating commissions and trying to insulate those commissions from executive branch influence. So I think there is experience to draw on. I think it is possible that Congress could contemplate a commission that is insulated from executive influence or create a new office in the Government Accountability Office to oversee, to take over what is now OSC's function, and to have more teeth. That way it would be a longer reach for the executive to influence that office.

I would like to say, too, that despite the common belief, I think, among attorneys and Members of Congress and the informed lay public, the Supreme Court has never ruled that the President of the United States has plenary authority over national security information or security clearances. Navy v. Egan was an internal dispute between the Navy and the MSPB. There was not a constitutional issue that was decided. That was a statutory issue in that case. The question was not whether or not Congress could exercise influence in the area of controlling or guiding national security information or security clearances. That issue has never been addressed. And I would find it remarkable that the Supreme Court would believe that Congress does not have a substantial role in guiding the national security information and the security of this country.

Mr. SHAYS. Thank you. I am going to have counsel ask some questions.

Mr. HALLORAN. Thank you, Mr. Chairman.

Mr. Zaid, in your testimony, one of the problems you cite is a delay of implementation of new adjudicative guidelines for clearances. Could you tell us more about that?

Mr. ZAID. Sure. On December 29th of last year, Stephen Hadley, the National Security Adviser, issued new adjudicative guidelines to replace those that President Clinton issued in 1995 and then which were implemented apparently by 1997. This, again, has become a very interesting dichotomy between the powers of the Presidency and internally within departments, in fact, because different departments are taking different positions.

These new adjudicative guidelines are actually more favorable to prospective clearance holders or current clearance holders.

Mr. HALLORAN. In what respect?

Mr. ZAID. Especially, for example, in the cases of foreign preferences. Foreign preferences, which would be as simple as having relatives overseas. There is nothing whatsoever in the truthworthiness or credibility or any actions that the individual has taken, but because you have relatives who live over in the People's Republic of China, you are seen as a security risk because China may torture those individuals or threaten to you that they may be tortured, so you can't have a clearance, which is inconsistently applied throughout the Federal Government.

The new regulations make it a little bit more difficult in concept for an agency to deny an individual a clearance based on foreign preference. They are more country-specific. They want you to look more at which country is involved. I had a case where a Canadian citizen was said to be a danger because he still had his Canadian citizenship and had to renounce it, or Great Britain, or numerous other countries where they are actually allies. So now there is supposed to be a distinction between allies and perceived enemies. There is also supposed to be more of a distinction about the level of contact that you have with your perceived family member that is overseas.

Mr. HALLORAN. This is a new attempt to standardize the consideration of these factors that was not there before?

Mr. ZAID. Well, it is an attempt to at least minimize the hundreds, if not potentially thousands of people who have been denied clearances based on very minuscule information. I had one case where a clearance was denied recently because the fellow had family members in Pakistan, and the administrative judge said because Pakistan is on the front lines of terrorism where the terrorists live and operate, I can't trust that this person has a clearance. But 3 years earlier, in the few weeks after September 11th, another administrative judge had ruled based on very similar facts of relatives over in Pakistan, Pakistan is on the front lines of terrorism, it is standing side by side with the United States as our ally, so we are going to give this fellow his security clearance. And this is at the Defense Office of Hearings and Appeals [DOHA]. So you have that type of inconsistency.

Mr. HALLORAN. What is DOD's problem with these new regulations?

Mr. ZAID. The new regulations, DOD takes the position that the President does not have the authority to tell it what to do without it putting forth a notice and comment period, because DOD has adopted the Executive order into its own regulations. So DOD, even though there is no way anybody could—if they offered a comment, DOD could not modify what the President has issued as far as reg-

ulations. They feel they have to issue these regulations in a notice and comment period in the Code of Federal Regulations and then wait. And their response is—because I have talked to the General Counsels about this—that this is what they did back in 1995. It took 18 months for those regulations to finally get implemented in 1997, so who knows when it is going to be?

The Justice Department lawyers who have been on this take the opposite view and say, look, Hadley's cover memo says—and he is speaking for the President—these regulations are to be implemented immediately, and that means they are to be applied immediately. You run into additional problems because does it apply to current pending cases where you haven't yet had the appeal, or does it apply to only new cases that come along, and that question also seems to vary throughout the different agencies.

Mr. HALLORAN. Thank you.

Ms. Daley, let's talk about the Department of Energy. I know POGO has done a lot of work there. We had heard sometime in the course of other investigations about a pretty entrenched culture of shoot the messenger there. Was that your experience as well?

Ms. DALEY. Absolutely, that has been our experience. We actually worked with a number of people inside of the DOE Nuclear Weapons Complex to expose wrongdoing and unethical or incompetent activities. Rich Levernier was one of the people that we worked with over many years, and we have been able to find a place where anonymous disclosures through POGO have been very effective at—you know, an effective avenue for people to voice their concerns. In fact, we have been able to help to move some things forward, but as you know, it has been very difficult to force the Department of Energy to change, in part because of the entrenched culture and also in part because of the fact that there are some people there who have protected the institution's interests at all costs.

Mr. HALLORAN. So you have become their kind of private IG?

Ms. DALEY. Pardon?

Mr. HALLORAN. You have become their kind of private IG?

Ms. DALEY. Exactly. We have become a private IG, and I would like to suggest to everyone in Congress that they can do the same. And I know that in this subcommittee you have done some of that. I think other committees should become private IGs. If you become known as a known quantity in a particular agency as a place where you can safely go, people will come to you.

Mr. HALLORAN. You mentioned before, in terms of the notional end state of a fixed system here, that it would be much like whistleblower protections government-wide, but you used the word "discreet," acknowledging the somewhat unique nature of national security information. How would you implement "discreet"?

Ms. DALEY. How do I define "discreet?"

Mr. HALLORAN. Well, in the system you envision, how would it be discreet, or at least more discreet than the one available to regular Title 5 employees?

Ms. DALEY. Well, I believe that people should be given the option of disclosing wrongdoing anonymously if they so choose. Currently in the Inspectors General, there has been mixed results about when that happens. In some cases, people's identities have been ex-

posed when they didn't want them to be exposed. I know that at different points in time there have been leaks from the hotlines of IGs, so a whistleblower will submit something that—you know, a disclosure about wrongdoing, and a couple weeks later their boss says, "Hey, thanks a lot for that hotline disclosure."

So, you know, "discreet" in my mind means a safe place where someone can go to disclose wrongdoing and potentially work with someone to shed light on it.

Mr. HALLORAN. Thank you.

Mr. Devine, let's talk about gag rules. You talked about kind of annual legislation to prevent the spending of money on gag rules, and yet the executive branch for as many years takes the position they can still execute gag rules using someone else's money? Or how does that work?

Mr. DEVINE. The procedure for it, sir, is that it is illegal to spend any Federal funds to implement or enforce a non-disclosure policy, form, or agreement unless it contains an addendum at the end, whether it is an oral briefing or in writing. And the addendum makes very clear that in the event of a conflict between those non-disclosure rules and a list of good-government statutes, ranging from whistleblower laws like the Whistleblower Protection Act or the Lloyd LaFollette Act on communications with Congress, to the Intelligence Identities Protection Act, which is a national security shield, that in the event of a conflict, the terms of those laws supersede contradictory language in the gag order, and that, in fact, the language of those good-government laws is incorporated by reference into the terms of the non-disclosure policy.

It was initially set up to deal with people losing their security clearances for disclosing information that was called "classifiable." That was information that wasn't classified, but after the fact there was a decision it should have been, usually because someone had blown the whistle with it. Now it has been very valuable against the recent pattern of gag orders, and it is applicable to concepts like sensitive but unclassified or for official use only. The problem with it is there is no remedy for someone to enforce those rights, and that is in H.R. 1317 and S. 494.

Mr. HALLORAN. All right. Thank you.

Dr. Weaver, describe a little further how reprisal actions might be criminalized and how either it would be so difficult to prove the intent element of that or it would be so oppressive that managers would not be able to manage.

Dr. WEAVER. There are lots of allied criminal activity—obstruction of justice, fraud in some cases. So I think that the idea of criminalizing behavior is not particularly difficult and presents no more problems than other criminalized activity in the agencies.

Of course, you have to walk a fine line. People generally only respond to coercive actions: you threaten their property or you threaten their liberty. You would have to be extremely careful how you went about it, but I think one of the preconditions would be that the retaliation was done to prevent disclosure of other criminal activity that in and of itself is criminal, such as fraud or lying to Congress or other sorts of activities.

So I think there would have to be a predicate to it, a predicate offense, and I think that it could be fraud, obstruction of justice,

things of that nature. But as of now, it is costless to retaliate against employees. There is no cost visited on the people that do it. In fact, oftentimes they are promoted for protecting the agency. They are rewarded for doing a good job of carving someone out of the herd who is creating problems and getting rid of them.

Mr. HALLORAN. Thank you.

Thank you, Mr. Chairman.

Mr. SHAYS. I would like to just end by asking if there is anything that you want to put on the record before we go to our new panel, any issue that we just need to make sure is a part of the record that is not right now.

Dr. WEAVER. Well, I would like to say that we oppose S. 494 and H.R. 1317, and the reason is that specifically national security whistleblowers excluded from both statutes, proposed statutes. There is no way, therefore, since our entire membership is made up of national security whistleblowers, that we can support that.

Mr. SHAYS. I am sorry. So yours is an association of national security——

Dr. WEAVER. Solely national security whistleblowers. The atmosphere, I think, in Government is such that it should be remarked upon, even employees that work for Congress. For example, Lou Fisher apparently, who is a prestigious researcher in the Congressional Research Service, is facing termination, strangely enough, for writing a CRS piece about retaliation against national security whistleblowers, and now he is suffering retaliation for writing the piece and commenting to Gov. Exec. He said, for example——

Mr. SHAYS. I am smiling because there is, obviously, an irony that is totally unacceptable. Is this a case that I should know about? Is this a case——

Dr. WEAVER. Sir, I think you should. He told Gov. Exec.—this is a near quote—that managers now can retaliate against whistleblowers with abandon and nothing happens to them. And Director Mulholland has ordered him to apologize to his division manager and, if not, apparently faces termination for that. So, I mean, this deference to——

Mr. SHAYS. OK. Yes, the point I am saying is that the report is written, but he actually feels that he will face consequences.

Dr. WEAVER. There is no doubt about it. He already has.

Mr. DEVINE. Mr. Chairman, I would second Dr. Weaver's point, that the Congressional Research Service is another agency not covered by the Whistleblower Protection Act, and they have currently demonstrated that they need to be; also, that Mr. Fisher needs all the solidarity he can get from Congress. Just yesterday his boss let him know that the apology that he turned in wouldn't suffice because—this is my paraphrase—it wasn't sufficiently groveling.

Ms. DALEY. I would support what my two colleagues have said. I think it is absolutely unfortunate that Mr. Fisher is being put in this position, and I do wonder why the agency has sought to silence his remarks about whistleblowers. What is behind that? And I think it might be interesting for you to try and find out because if there is a dynamic that is occurring with regard to his report, I wonder if there is pressure being placed on other researchers as well to alter their determinations.

Mr. SHAYS. Thank you.

Mr. ZAID. Two comments, Mr. Chairman. Dr. Weaver is correct about the Supreme Court case of Egan. The problem is it has been interpreted by all the lower courts to be completely expansive and controlling with respect to any substantive security clearance challenge. I want to read one sentence to you from that because it applies directly to this committee and this Congress, and it is talking about deference to the executive branch on matters of military and national security, and it says: "Thus, unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority"—yada, yada. So the Supreme Court is putting it right into the court of Congress to tell it differently as to whether or not you want these types of claims to go before it.

With that, the only thing I want to say, because I think it is extremely important because it does the most damage many times to anyone with respect to the clearance or the whistleblowers, and that is the undue delay and the unpaid suspensions, and it varies throughout the agencies. Most of these clearance cases will take minimum 6 to 12 months to get resolved, oftentimes longer than that, 12 to 24 months. Some of the agencies, like the Department of the Army and the Department of the Air Force, will place those individuals on unpaid suspensions during that entire period of time. And so you can imagine, again, as I said before, what impact that has. Of course, it also creates a bankruptcy problem that is itself a justification for revocation of a security clearance.

DIA, to its credit, the one thing I will actually give it credit, places its people on paid suspension during this time period. I have had clients routinely go 2 years in paid suspension while their clearance matter is adjudicated. Now, that might raise a different issue for waste, fraud, and abuse for paying somebody to do absolutely nothing, but I would say it is at least better than being in this unpaid suspension route.

Mr. SHAYS. I would agree with you. I would agree.

Mr. ZAID. And that is even when there is unclassified work available for that individual to perform. They will still place them in unpaid suspension. And I want to thank you for your attention to this issue.

Mr. SHAYS. In 1994 or 1995, we came in with a Congressional Accountability Act, which was to get Congress to abide by all the laws we impose on the rest of the Nation. And clearly that whistleblower statute should apply not just to CRS; it should apply to our own offices and so on. So, you know, we need to take a good look at that.

Let me do this. We have kept our last panel waiting 4 hours, and I think I need to get to that panel as well, obviously now rather than much later. So I thank you all very, very much.

Our final panel is Mr. James McVay, Deputy Special Counsel, U.S. Office of the Special Counsel; Mr. Thomas Gimble, Acting Inspector General, Office of the Inspector General, Department of Defense, accompanied by Ms. Jane Deese, Director, Military Reprisal Investigations, and Mr. Daniel Meyer, Director, Civilian Reprisal Investigations; testimony again from Mr. Glenn A. Fine, Inspector General, Office of the Inspector General, Department of Justice; and Mr. Gregory Friedman, Inspector General, Office of the Inspector General, Department of Energy.

I am sorry, I should have gotten you before you sat down. You know what, you can stay sitting, if you want. Good grief, you have been—I am swearing you in. But you do not need to stand for this. If you would raise your right hand, and anybody else who will be testifying, please raise your right hands.

[Witnesses sworn.]

Mr. SHAYS. Note for the record that the witnesses have responded in the affirmative.

I want to, again, thank you. As Government officials, it is usually the practice that you would go first. I hope it is evident to you why we didn't want you to go first, is basically the system is being in question. I have huge questions. I didn't want to hear about how the system works in theory; I want to hear how it works in practice. I would love dearly for you, besides your testimony, if you feel so inclined, to just tell us how you feel about what you have heard and where the system is broken and where it needs to be fixed.

You didn't invent the system. You didn't draft the legislation. You are implementing it to the best of your ability. I want to know how we fix the system. And if you don't think it needs to be fixed, I really need to have you tell me why you don't think it needs to be fixed.

So, Mr. McVay, you have the floor.

And the other thing I will say to you is—you have waited until the end—I will hear your testimony as long as you want to make your testimony. And we won't leave until everything you want to put on the record is on the record.

Thank you.

STATEMENTS OF JAMES McVAY, DEPUTY SPECIAL COUNSEL, U.S. OFFICE OF THE SPECIAL COUNSEL; THOMAS GIMBLE, ACTING INSPECTOR GENERAL, OFFICE OF THE INSPECTOR GENERAL, DEPARTMENT OF DEFENSE, ACCOMPANIED BY JANE DEESE, DIRECTOR, MILITARY REPRISAL INVESTIGATIONS, OFFICE OF THE INSPECTOR GENERAL, DEPARTMENT OF DEFENSE, AND DANIEL MEYER, DIRECTOR, CIVILIAN REPRISAL INVESTIGATIONS, OFFICE OF THE INSPECTOR GENERAL, DEPARTMENT OF DEFENSE; GLENN A. FINE, INSPECTOR GENERAL, OFFICE OF THE INSPECTOR GENERAL, DEPARTMENT OF JUSTICE; AND GREGORY H. FRIEDMAN, INSPECTOR GENERAL, OFFICE OF THE INSPECTOR GENERAL, DEPARTMENT OF ENERGY

STATEMENT OF JAMES McVAY

Mr. MCVAY. Mr. Chairman, thank you for inviting me here. I am the Deputy Special Counsel of the U.S. Office of Special Counsel [OSC]. I am pleased to be here to explain our office's role in protecting Federal whistleblowers from retaliation. The Office of Special Counsel is an independent Federal investigative and prosecutorial agency. Our authority and responsibility come from four Federal statutes: the Civil Service Reform Act; the Whistleblower Protection Act; the Hatch Act, which prevents partisan political activity in the Federal workplace; the Uniformed Services Employment and Reemployment Rights Act, which ensures the reemployment of servicemembers. OCS's primary mission, however, is to safeguard

the merit system by protecting Federal employees and applicants from prohibited personnel practices and, especially, reprisals from whistleblowing.

OSC receives, investigates, and prosecutes allegations of prohibited personnel practices, with an emphasis on protecting Federal Government whistleblowers. OSC has authority to seek corrective action for aggrieved employees, such as back pay and reinstatement to their jobs. We do this through negotiation with the agency or by filing an action with the Merit Systems Protection Board. OSC is also authorized to file complaints at the Merit Systems Protection Board to seek disciplinary action against managers who commit prohibited personnel practices. Punishment and disciplinary action cases can range from a simple letter of counseling all the way to debarment from Federal service.

OSC also provides a secure and confidential channel through its Whistleblower Disclosure Unit for Federal workers to disclose information about various workplace improprieties, including violations of law, rule, regulation; gross mismanagement, including violations of waste of funds, abuse of authority, and substantial danger to public health and safety.

As I stated earlier, protecting employees and applicants from reprisal from whistleblowing was a primary purpose of the Civil Service Reform Act. However, we have no jurisdiction to handle claims from intelligence agency employees such as the Central Intelligence Agency, the Federal Bureau of Investigation, Defense Intelligence Agency, the National Security Agency, and others specifically excluded by the President. OSC takes no position on the merit of whether or not we should have this jurisdiction. There are other organizations and professionals that are able to more competently discuss these issues. Nonetheless, I can testify as to how OSC investigates and improves whistleblower retaliation claims. I hope this can be of benefit to this subcommittee in rendering any appropriate proposed legislation.

I would now like to preface the remainder of my remarks or comments by explaining what I mean when I say the word "whistleblower," and not just in the context of a Government employee.

To us, in the theoretical sense I am talking no less than good versus evil and right versus wrong. You saw that earlier today. In its purest form, a whistleblower is an individual who is willing to take on odds, often in face of danger and retaliation, to bring to light of day a wrong that has been committed against society. Their intention is no less than creating a better society in which to live and a more ethical government to rule us all. In fact, I believe the American Republic can not long survive without disciplined Government and a fair and honest corporate structure. Whistleblowers serve this end.

America has the finest tradition of whistleblowers. Popular examples are Serpico, who brought to light corruption in the New York Police Department. Another one is "the insider," who blew the whistle on the tobacco industry for making their products more addictive.

A more relevant example for our purposes is Ernie Fitzgerald, who brought to light billions of dollars in cost overruns in the construction of the C–5A transport years ago. It cost him his job when

his managers retaliated against him. His case was one of the groundbreaking cases reviewed in the Leahy Commission report which later gave us the Civil Service Reform Act.

The Office of Special Counsel receives up to 700 whistleblower reprisal claims per year. Additionally, we receive approximately 450 whistleblower disclosure cases per year. After an initial screening for jurisdiction and to ensure the whistleblower has stated a prima facie case, the meritorious reprisal cases are sent to our Investigation and Prosecution Division. Ultimately the case may end up in trial in front of the Merit Systems Protection Board. In reprisal cases, OSC must establish the following elements by preponderant evidence. Hopefully, this can be of help.

We must show that the complainant made a protected disclosure, first. We must then show that there was a personnel action taken in regard to that employee. The third is the official responsible for the personnel action, the manager, knew about the complainant's protected disclosure. And last, the protected disclosure, we have to prove, was a contributing factor in the official taking the personnel action.

Once we establish these elements, then the agency has the right, under the laws written by Congress, to defend the action by showing with clear and convincing evidence that it would have taken the action even in the absence of the claimant's protected disclosure.

In conclusion, I would like to quote one of the Founding Fathers. In 1776, John Adams said: "Good government is an empire of laws." At OSC we believe in an empire of laws which create good government and inspire integrity and public trust.

Thank you.

[The prepared statement of Mr. McVay follows:]

Testimony of James McVay, Deputy Special Counsel,

U.S. Office of Special Counsel

Mr. Chairman, Members of the subcommittee, thank you for inviting me to testify today.

I am the Deputy Special Counsel at the U.S. Office of Special Counsel (OSC) and am pleased to be here to explain our office's role in protecting federal whistleblowers from retaliation. The OSC is an independent federal investigative and prosecutorial agency. Our authority and responsibility comes from four federal statutes; the Civil Service Reform Act (CSRA), the Whistleblower Protection Act (WPA), the Hatch Act, and the Uniform Services Employment and Reemployment Rights Act. OSC's primary mission is to safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices (PPP), especially reprisal for whistleblowing.

OSC receives, investigates, and prosecutes allegations of Prohibited Personnel Practices, with an emphasis on protecting federal government whistleblowers. OSC has authority to seek corrective action for aggrieved employees such as back pay and reinstatement. We do this through negotiation or by filing an action in front of the Merit Systems Protection Board (MSPB). OSC is also authorized to file complaints at the MSPB to seek disciplinary action against individuals who commit PPPs. Punishment can range from a simple letter of counseling all the way to debarment from federal service.

OSC provides a secure channel through its Disclosure Unit for federal workers to disclose information about various workplace improprieties, including a violation of law,

rule or regulation, gross mismanagement and waste of funds, abuse of authority, or a substantial danger to public health or safety.

OSC promotes compliance by government employees with legal restrictions on political activity by providing advisory opinions on, and enforcing, the Hatch Act. Every year, OSC's Hatch Act Unit provides over a thousand advisory opinions, enabling individuals to determine whether their contemplated political activities are permitted under the Act. The Hatch Act Unit also enforces compliance with the Act. Depending on the severity of the violation, OSC will either issue a warning letter to the employee, or prosecute a violation before the MSPB.

OSC protects the reemployment rights of federal employee military veterans and reservists under the Uniformed Services Employment and Reemployment Rights Act (USERRA).

As I stated earlier, Protecting employees and applicants from reprisal for whistleblowing was a primary purpose of the Civil Service Reform Act.[1] However, we have no jurisdiction to handle claims from intelligence agency employees such as the Central Intelligence Agency, the Federal Bureau of Investigation, the Defense Intelligence Agency, the National Security Agency and others specifically excluded by the President. OSC takes not position on the merit of whether they should or should not be covered. There are other organizations and professionals that are able to more competently discuss these issues. Nonetheless, I can testify as to how OSC investigates and proves whistleblower retaliation claims. I hope this can be of benefit to this committee in rendering appropriate legislation.

[1] In re Frazier, 1 M.S.P.R. 163, 165 n.1 (1979).

I would like to preface the remainder of my comments by explaining what I mean when I say the word "whistleblower", and not just in the context of government.

In the theoretical sense, I am talking no less than good versus evil – right versus wrong. In its purest form a whistleblower is an individual that is willing to take on all odds, often in the face of danger and retaliation, to bring to the light of day a wrong that has been committed against society. Their intention is no less than creating a better society in which to live and an ethical government that rules us all. In fact, I believe that the American republic can not long survive without disciplined government and a fair and honest corporate structure. Whistleblowers serve that end.

America has the finest tradition of whistleblowers. Popular examples are Frank Serpico, who brought to light corruption in the NYPD, and was later abandoned by his fellow officers when shot by a drug dealer. Another contemporary example is the "insider" who blew the whistle on the tobacco industry for making their product more addicting.

As an interesting aside, Serpico actually favors the term "lamplighter" over the use of the word "whistleblower." He likes to point out that Paul Revere, who made that midnight ride on 4-18-1775, was the first lamplighter. The lighted lamp warned the people of Massachusetts of the British invasion. He believes that whistleblowers are lamplighters that shed the light of truth and warns the citizenry of waste, fraud and corruption. He believes they also shed light on the path to be taken by all of those in places of power.

For a modern example of a lamplighter/whistleblower and in the context of the federal worker, Ernie Fitzgerald brought to light billions of dollars in cost overruns in the

construction of the C-5A transport aircraft. It cost him his job when his managers retaliated against him. His case was one of the groundbreaking cases reviewed in the Leahy commission report, which later gave us the Civil Service Reform Act.

OSC receives up to 700 whistleblower reprisal claims per year. Additionally, we receive approximately 450 whistleblower disclosure cases per year. After an initial screening for jurisdiction and to ensure the Whistleblower has stated a prima fascia case, the meritorious reprisal cases are sent to our investigation and prosecution division. Ultimately the case may end in trial at the MSPB. In reprisal cases OSC must establish the following elements by preponderant evidence:

1. Complainant made a **protected disclosure**;
2. a personnel action was taken, not taken, or threatened;
3. the official responsible for the personnel action knew about Complainant's protected disclosure; and
4. the protected disclosure was a contributing factor in the official's decision to take, fail to take, or threaten the personnel action.

Once OSC establishes these elements, then the agency has the opportunity to defend its action by showing with clear and convincing evidence that it would have taken, failed to take, or threatened the same personnel action even in the absence of the Complainant's protected disclosures.

A "protected disclosure" is one that the discloser **reasonably believes** evidences one of the identified conditions in the statute. However, like all acts of Congress the courts have added changes. In Horton v. Department of the Navy, the Federal Circuit held that disclosures made directly to the wrongdoer are not protected because such

disclosures are not to a person in a position to act to remedy the problems revealed in the disclosures. The court reasoned that the Whistleblower Protection Act was intended to protect only disclosures to persons who are in position to act to remedy the condition and, the court assumes, the wrongdoer is not such a person. The court failed to explain why a disclosure to the wrongdoer would not be reasonably calculated to remedy the wrongdoing. In reality, they assume the wrongdoer is of such low character that he would not self report or cease his violation.

In a move to further narrow the law, however, the Federal Circuit in Willis v. Department of Agric., 141 F.3d 1139 (Fed. Cir. 1998), held for the first time that a disclosure made in the regular course of one's duties does not qualify as whistleblowing, even if it evidences violations of law. The court held that such a disclosure is not whistleblowing because the employee is simply doing his job; he is not putting his own personal job security at risk for the benefit of the public.

Next, I will discuss OSC's authority to review whistleblower disclosures under 5 USC § 1213, through our Disclosure Unit. These are the cases that do not necessarily have an allegation of reprisal. When Special Counsel Bloch took office in January 2004, this unit was adrift in a sea of backlogged cases. In a little over one year we have been able to reduce the case load in the Disclosure Unit by 88%. We started the year 2004 with more than 600 whistleblower cases and ended with fewer than 100. We have been able to maintain this same count. During this same period we were able to increase our referrals to the agencies by nearly double.

Under this statute, as most of you may know, my office has no investigative authority over the substance of what the whistleblower discloses. This is where we have

a unique relationship with the Federal Executive Agencies and the Inspectors General. Under the statute we are required to refer the underlying disclosure to the head of the agency for an investigation and report which eventually will be transmitted to the President and the agency's congressional oversight committees, along with an analysis by the Special Counsel.

A perfect example is the case that involves a main engine component of the C-5 Galaxy military aircraft. An aerospace engineer, with more than 25 years experience, disclosed that the Air Force was using unsafe repair methods that could result in catastrophic failure of the engine, i.e. the engine falls off during flight. The repair method used was specifically contrary to the manufacturer's specifications and directions.

In conclusion I would like to cite one of our founding fathers. John Adams said in 1776, "Good government is an empire of laws." At OSC, we believe in an empire of laws, which create good government and inspire integrity and public trust. While we must as Americans live with the idea of not trusting our government fully, we can also take pride in the fact that we among the nations of the world are a leader in protecting the lamp lighters that shed the light of truth on government fraud, waste and abuse.

Thank you for the opportunity to testify and I am happy to take any questions.

Mr. SHAYS. Thank you. Before going to our next witness, all the cases that you heard today, you would not have handled any of them. Correct?

Mr. MCVAY. The only one I am familiar with, sir, is the Levernier case. And that was his disclosure case, his prohibited——

Mr. SHAYS. That would come under your jurisdiction; the others would not have come under your jurisdiction?

Mr. MCVAY. That is correct.

Mr. SHAYS. But his would have?

Mr. MCVAY. That is correct. His would have, that is correct.

Mr. SHAYS. OK. Thank you.

Mr. MCVAY. Let me make that clear, if I can. The revocation of a security clearance is not considered a personnel action. In addition, as I explained in my testimony, there are certain agencies that are not covered under the auspices of the Special Counsel or the Merit Systems Protection Board as it relates to those. In essence, there are two ways that prevent us from investigating and potentially prosecuting or seeking corrective action for a complainant in this setting.

Mr. SHAYS. OK, tell me again the two ways?

Mr. MCVAY. One, the statute is very clear and the President can even except further agencies from coverage under the act.

Mr. SHAYS. Right.

Mr. MCVAY. Second, the revocation of a security clearance is not considered a personnel action.

Mr. SHAYS. OK. Thank you.

Mr. MCVAY. Does that answer your question?

Mr. SHAYS. It does.

Mr. Gimble, thank you.

STATEMENT OF THOMAS GIMBLE

Mr. GIMBLE. Mr. Chairman, thank you for the opportunity to appear this afternoon to discuss whistleblower protections within the Department of Defense.

Mr. SHAYS. You know, you are very gracious, Mr. Gimble, in not saying "this evening." [Laughter.]

Thank you.

Mr. GIMBLE. I was getting to that, Mr. Chairman.

Mr. SHAYS. Yes, I know.

Mr. GIMBLE. These protections include prohibiting reprisal through suspension or revocation of security clearances.

I am accompanied here today by Ms. Jane Deese, the Director of our Military Reprisal Investigations, and Mr. Dan Meyer, the Director of our Civilian Reprisal Investigations.

Based on the information from our Defense Hotline, reprisal complaints involving the suspension or revocation of security clearances are rare. One reason for the rarity may be due to the significant due process protections found in DOD regulation 5200.2-R, Personnel Security Program.

The most critical protection provided employees is that the supervisor recommending an unfavorable action against an employee's security clearance is not a part of the adjudication process. Instead, the security clearance decisions are adjudicated by security

professionals that work in one of the eight DOD central adjudication facilities.

However, any system can be abused, and my office has broad responsibility for investigating allegations of reprisals. Three specific whistleblower statutes in Title 10 apply to DOD. Section 1034 applies to the military personnel; section 1587 applies to civilian nonappropriated fund employees; and section 2409 applies to employees of Defense contractors.

The Office of Special Counsel has jurisdiction over prohibited personnel practices taken against most Title 5 civilian appropriated fund employees in executive agencies, including the Department of Defense. The Office of Special Counsel does not have jurisdiction over employees of intelligence agencies that have been excluded by the President. For employees of the intelligence agencies as well as the other DOD employees, section 7 of the Inspector General Act gives my office broad authority to investigate allegations of reprisals against whistleblowers.

One statute often confused as providing protection from reprisal is the Intelligence Community Whistleblower Protection Act of 1998. The purpose of the act is to provide a means to communicate classified information to Congress from the executive branch employees engaged in intelligence and counterintelligence activities. The act in itself, however, does not provide statutory protection from reprisal. We have received only three of these complaints since 1998, and none have involved the suspension or revocation of a security clearance.

Within my office there are two directorates responsible for conducting and overseeing reprisal investigations. The Military Reprisal Investigations Directorate investigates allegations of reprisals submitted by members of the armed forces, nonappropriated fund employees, and employees of Defense contracts. Under statute, my office is required to investigate or oversee the investigation of all reprisal complaints submitted by members of the armed forces.

My office established the Civilian Reprisal Investigations Directorate [CRI], in 2004 to provide an alternate whistleblower protection program for Title 5 employees and in particular the employees of Defense intelligence agencies who do not have OSC protections under Title 5.

I have recently proposed a new DOD instruction formalizing a general Title 5 civilian whistleblower protection program. This instruction is currently in formal coordination within the Department and will govern the policies and procedures to assist civilian employees who allege reprisal for their whistleblowing activities.

Creating and maintaining an environment where Government employees feel safe to report fraud, waste, and abuse is crucial to good governance. Protecting whistleblowers is one of the key duties of the Inspector General. I appreciate your interest in this very important issue.

That concludes my statement.

[The prepared statement of Mr. Gimble follows:]

February 14, 2006

Hold for Release
Expected 1:00 p.m.

Statement
of
Mr. Thomas F. Gimble
Acting Inspector General
Department of Defense

before the

Subcommittee on National Security, Emerging Threats,
and International Relations
House Committee on Government Reform

on

National Security Whistleblower Protection

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to appear this morning to discuss whistleblower protections available to members of the military personnel, Department of Defense (DoD) civilian employees, and employees of DoD contractors. Accompanying me are Ms. Jane Deese, Director of Military Reprisal Investigations, and Mr. Dan Meyer, Director of Civilian Reprisal Investigations.

My comments address three general areas I believe to be of interest to the Subcommittee:

1. Personnel actions involving an individual's security clearance;

2. The general availability of whistleblower protection, and

3. Our procedures for investigating complaints of reprisal for whistleblowing.

The hearing invitation letter stated that the Subcommittee wanted to discuss "revocation of an employee's national security clearance as a method of retaliation against those who attempt to point out wrongdoing in security agencies."

In preparation for this testimony we reviewed our Defense Hotline records. Based on this review, I can say that reprisal complaints involving security access/clearance decisions are rare. We identified 19 cases submitted to the Hotline during the past fifteen years that included allegations involving abuses of security clearances. The allegations were either not substantiated or were closed after a preliminary inquiry determined there was insufficient evidence to warrant a full investigation.

I. PERSONNEL ACTIONS INVOLVING SECURITY CLEARANCES

One reason why so few whistleblower reprisal allegations involve the suspension or revocation of security access or clearance may be due to the significant due process protections provided to personnel holding security clearances. Additionally, most security adjudications are conducted by individuals external to the immediate environment where the alleged reprisal occurred.

Due to the significance an unfavorable personnel security decision can have on an employee's career, the DoD has established due process and appeal procedures in DoD regulation 5200.2-R, "Personnel Security Program," dated January 1987.

This regulation implements Executive Order No. 12968, "Access to Classified Information" (August 4, 1995) which prescribes a government-wide uniform system for determining eligibility for access to classified information. DoD Regulation 5200.2-R provides that no unfavorable administrative action may be taken against an employee unless the employee is provided a written statement of the reasons as to why the unfavorable administrative action is being taken. The statement of the reasons is to be as comprehensive and detailed as privacy and national security concerns permit and should contain the following information:

(1) A summary of the security concerns and supporting adverse information,

(2) Instructions for responding to the statement of reasons, and

(3) Copies of the relevant security guidelines.

An agency representative is assigned to ensure that the employee understands the consequences of the proposed action and the necessity to respond in a timely fashion. The employee is advised how to obtain time extensions, how to procure copies of investigative records, and how to file a rebuttal to the statement of the reasons. The employee is further advised that he or she can obtain legal counsel or other assistance at his or her own expense.

The most critical protection provided the employee is that the supervisor recommending any unfavorable action against an employee's security clearance is not part of the adjudication process. Instead, security clearance decisions are adjudicated by experienced security specialists who work in the eight Central Adjudication Facilities (CAFs) that DoD has established in the Departments of the Army, Navy, and Air Force, and the Washington Headquarters Services (WHS), the Defense Office of Hearings and Appeals (DOHA), the Joint Chiefs of Staff, the Defense Intelligence Agency (DIA), and the National Security Agency (NSA).

The chief of each CAF has the authority to act on behalf of the head of the component regarding personnel security determinations. CAFs are tasked to ensure uniform application of security determinations and to ensure that DoD personnel security determinations are made consistent with existing statutes and Executive orders.

The CAF must provide a written response to an employee's rebuttal stating the reason(s) for any final unfavorable administrative decision. The CAF's response must be as specific as privacy and national security considerations permit. The CAF's response, known as the Letter of Denial (LOD), may be appealed with or without personal appearance to the DoD Component Personnel Security Appeals Board (PSAB). Personal appearances are heard before a Defense Office of Hearings and Appeals (DOHA) Administrative Judge (AJ).

After review of the employees appeal package and/or the Administrative Judge's recommendation, the PSAB must provide a final written decision including its rationale for the final disposition of the appeal.

These due process and appeal procedures provide reasonable assurance that an unfavorable personnel security decision was made for proper reasons in an objective fashion, and not as a form of reprisal.

II. General Availability of Whistleblower Protection

The Office of Inspector General (OIG) has the authority to investigate adverse security clearance and access decisions as part of its broad responsibility for investigating allegations that individuals suffered reprisal for making disclosures of fraud, waste and abuse to certain authorities.

These responsibilities derive from both the Inspector General Act of 1978 and various statutory provisions applicable to specific classes of individuals. These laws were enacted and amended various times since 1978, and while similar in many respects they are not uniform in the protections they afford. However, they do provide a quilt of legislative provisions organized by the status of individual alleging they were reprised against as a result of their protected activity. A brief description of the protections available to whistleblowers follows.

Military Whistleblower Protection Act

Public Laws 100-456, 102-190, and 103-337 (codified in Title 10, United States Code, Section 1034 (10 U.S.C. 1034) and implemented by DoD Directive 7050.6, "Military Whistleblower Protection," June 23, 2000) provide protections to members of the Armed Forces who make or prepare to make a lawful communication to a Member of Congress, an Inspector General, or any member of a DoD audit, inspection, investigative or law enforcement organization, and any other person or organization (including any person or organization in the chain of command) designated under Component regulations or other established administrative procedures for such communications concerning a violation of law or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public safety.

Employees of Nonappropriated Fund Instrumentalities (NAFI)

Title 10, United States Code, Section 1587 (10 U.S.C. 1587), "Employees of Nonappropriated Fund Instrumentalities: Reprisals," prohibits the taking or withholding of a personnel action as reprisal for disclosure of information that a NAFI employee or applicant reasonably believes evidences a violation of law, rule, or regulation; mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. Section 1587 requires that the Secretary of Defense prescribe regulations to carry out that Statute. Those regulations are set forth as DoD Directive 1401.3, "Reprisal Protection for Nonappropriated Fund Instrumentality Employees/Applicants."

Employees of Defense Contractors

Title 10, United States Code, Section 2409 (10 U.S.C. 2409), "Contractor Employees: Protection from Reprisal for Disclosure of Certain Information," as implemented by Title 48, Code of Federal Regulations, Subpart 3.9, "Whistleblower Protections for Contractor Employees," provides that an employee of a Defense contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a Member of Congress or an authorized official of an agency or the Department of Justice information relating to a substantial violation of law related to a contract.

U.S. Office of Special Counsel (OSC)

Pursuant to 5 U.S.C. § 1214, the U.S. Office of Special Counsel (OSC) has jurisdiction over prohibited personnel practices committed against most employees or applicants for employment in Executive Branch agencies including the Department of Defense. Current and former federal employees and applicants for federal employment may report suspected prohibited personnel practices to the OSC. The matter will be investigated, and if there is sufficient evidence to prove a violation, the OSC can seek corrective action, disciplinary action, or both. OSC has determined that a federal employee or applicant for employment engages in whistleblowing when the individual discloses to the Special Counsel or an Inspector General or comparable agency official (or to others, except when disclosure is barred by law, or by Executive Order to avoid harm to the national defense or foreign affairs) information which the individual reasonably believes evidences the following types of wrongdoing: a violation of law, rule, or regulation; or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

While OSC has broad jurisdiction, it has no jurisdiction over prohibited personnel practices (including reprisal for whistleblowing) committed against employees of the Central Intelligence Agency, Defense Intelligence Agency, National Security Agency, and certain other intelligence agencies excluded by the President, (see 5 U.S.C. §2302(a)(2)(C)(ii)).

Protections Available for Intelligence and Counterintelligence Personnel

For civilian employees of intelligence agencies who are exempted from OSC jurisdiction, Title 5 states that the heads of agencies should implement internal policies regarding merit systems principles and whistleblower reprisal protections. Specifically, these agencies are required to use existing authorities to take any action, "including the issuance of rules, regulations, or directives; which is consistent with the provisions of [title 5] and which the President or the head of the agency ... determines is necessary to ensure that personnel management is based on and embodies the merit system principles." (5 U.S.C. 2301(c))

DoD Regulation 5240.1-R, "Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons" (December 11, 1982), requires that the heads of DoD agencies that contain intelligence components shall ensure that no adverse action is taken against employees that report a "questionable activity" (defined as "any conduct that constitutes, or is related to, an intelligence activity that may violate the law, any Executive order or Presidential directive . . . or applicable DoD policy.") [See, DoD Regulation 5240.1-R, Procedure 14, "Employee Conduct," and Procedure 15 "Identifying, Investigating and Reporting Questionable Activities."]

The Assistant to the Secretary of Defense for Intelligence Oversight (ATSD I/O) administers this regulation. In discussions with the staff of the ATSD I/O, we were informed that very few of the complaints filed by DoD employees involved in intelligence and counterintelligence activities have included allegations of reprisal for whistleblowing activities.

Intelligence Community Whistleblower Protection Act of 1998

One statute that is often confused as providing protection from reprisal for whistleblowing is the Intelligence Community Whistleblower Protection Act of 1998 (ICWPA), enacted as part of the Intelligence Authorization Act for FY 1999 and which amended the Inspector General Act of 1978, 5 U.S.C. App. § 8H .

Despite its title, the ICWPA does not provide statutory protection from reprisal for whistleblowing for employees of the intelligence community. The name "Intelligence Community Whistleblower Protection

Act" is a misnomer; more properly, the ICWPA is a statute protecting communications of classified information to the Congress from executive branch employees engaged in intelligence and counterintelligence activity.

ICWPA applies only to employees of, and military personnel assigned to, the four DoD intelligence agencies: the Defense Intelligence Agency (DIA), National Geospatial-Intelligence Agency (NGA), the National Reconnaissance Office (NRO) and the National Security Agency (NSA). The ICWPA does not apply to intelligence or counterintelligence activities of the Military Services, Unified Commands or the Office of the Secretary of Defense. As an example, an intelligence analyst working for the Department of the Army would not have recourse to this statute.

The ICWPA may be used when an employee wants to communicate with the Congress, and:

- The complaint/information involves classified material;
- The employee does not want agency management to know the source of classified complaint/information or does not believe management will transmit it to Congress.

Not all disclosures are germane to the ICWPA. It is limited to complaints of "urgent concern." While the ICWPA has no "whistleblower protection" clause, it does define as an "urgent concern," instances of violation of Section 7(c) of the IG Act which prohibits the act or threat of reprisal against those who complain/disclose information to an IG. OIG DoD will conduct an appropriate inquiry in these instances to ensure that Section 7(c) was not violated. Only three complaints filed under the auspices of the ICWPA have been made to our office since 1998, and none involved the suspension or revocation of a security clearance.

III. Investigation of Complaints of Reprisal For Whistleblowing

Currently, within the DoD OIG, two Directorates are responsible for conducting and overseeing investigations of complaints that military personnel or civilian employees suffered reprisal for making a disclosure protected by applicable statute. The Military Reprisal Investigations

Directorate has conducted such investigations for over twenty years. Additionally, in 2003 we established a separate Civilian Reprisal Investigations Directorate to examine the role the DoD OIG should play in investigating allegations of reprisal made by civilian appropriated fund employees. Establishing the proper role and appropriate staffing for the Directorate is an ongoing process as we seek to determine the best utilization of limited resources. A brief description of each Directorate follows.

Military Reprisal Investigations Directorate (MRI)

The Military Reprisal Investigations (MRI) Directorate conducts and oversees investigations of reprisal complaints submitted under three whistleblower protection statutes. For over 20 years, the DoD OIG has addressed complaints of whistleblower reprisal submitted by members of the Armed Forces, nonappropriated fund employees (employees of the military exchanges, recreational facilities, etc.) and employees of Defense contractors. Although the Military Department IGs receive and investigate about 75% of reprisal complaints made by military members, MRI has the statutory responsibility to oversee these investigations and approve the findings. In addition, MRI investigates all reprisal complaints submitted by NAF and Defense contractor employees. The number of reprisal complaints received from military members, NAF and Defense contractor employees has steadily increased from under 20 complaints in FY 1991 to 552 complaints in FY 2005. Currently MRI has a staff of 17 administrative investigators.

MRI has developed efficient procedures to conduct preliminary inquiries and investigations to ensure that all whistleblower reprisal complaints are thoroughly addressed, and in a timely manner. The Military IGs have established similar procedures. MRI works closely with the Military IGs on all aspects of the investigative process.

The preliminary inquiry entails an in-depth interview with the complainant, followed by fact-finding and analysis of available documents and evidence. The investigator determines whether the allegations meet the criteria for protection under the governing statue. The investigator then writes a Report of Preliminary Inquiry that documents the answers to the following three questions:

- Did the complainant make a communication protected by statute?
- Was an unfavorable action subsequently taken or withheld?
- Was the management official aware of the communication before taking the action against the complainant?

The investigator presents the results of the preliminary inquiry to a Complaint Review Committee, comprised of the five senior MRI managers. If the MRI Complaint Review Committee determines that sufficient evidence exists to pursue a full investigation of the reprisal allegations, MRI will conduct an on-site investigation that includes sworn interviews with the complainant, the management officials responsible for the unfavorable personnel actions taken, and any other witnesses with relevant knowledge.

In a full investigation, a fourth question must be answered: Would the responsible management official have taken the same action absent the complainant's protected communication? We analyze the evidence and form a conclusion based on a preponderance of the evidence.

Civilian Reprisal Investigations Directorate (CRI)

Under the Inspector General Act of 1978 (as amended by Public Law 97-252), the DoD OIG is given broad authority to investigate complaints by DoD employees concerning violations of law, rules, or regulations, or concerning mismanagement, gross waste of funds, or abuse of authority (see §7(a), IG Act). Congress also mandated that DoD employee shall not take reprisal action against an employee who makes such a complaint (see §7(c), IG Act). Under this broad grant of authority, the DoD OIG has authority to investigate allegations of reprisal for whistleblowing received from civilian appropriated fund employees, both employees covered by OSC's protections and those excluded from such coverage (i.e., members of intelligence community).

CRI was established in 2003 to provide an alternate means by which DoD civilian appropriated fund employees could seek protection from reprisal. This is done in coordination with the U.S. Special Counsel. CRI was established with the goal of providing limited protection for DoD

appropriated fund employees, who also have recourse to OSC, and DoD intelligence and counterintelligence employees, who do not.

There are several areas where CRI has assisted DoD appropriated fund employees. First, CRI provides the information and assistance for employees who seek to file a complaint for alleged reprisal or a disclosure of a violation of law, rule and/or regulation. Second, CRI is available to assist DoD intelligence and counterintelligence employees who seek redress for alleged reprisal, where OSC has no jurisdiction. Third, CRI is assists the Inspector General in completing his statutory obligations under the ICWPA to inform Congress of matters of "urgent concern," (see §8H, IG Act). Additionally, CRI is our in-house advocate for the Section 2302(c) Certification Program administered by OSC.

CRI supports all categories of DoD civilian appropriated fund employees alleging reprisal for making a disclosure by statute or internal regulation. Since its establishment, CRI's efforts have concentrated in advising whistleblowers seeking protection from the Office of Special Counsel and aiding whistleblowers in making a disclosure alleging a violation of law, rule and/or regulation. CRI has also investigated select complaints under the authority of Sections 7(a) and (c) of the IG Act.

Proposed DoD Civilian Whistleblower Instruction

The creation of CRI allows the DoD OIG to further publicize the message that whistleblowers will be protected from reprisal. Additionally, it currently provides resources to investigate a limited number of individual claims of reprisal for whistleblowing. Last month, I submitted a Department of Defense Instruction for formal coordination within DoD. This instruction will govern the operations of CRI and formalize the procedures by which CRI can assist DoD employees claiming reprisal for whistleblowing activities. Significantly, this instruction will extend whistleblower protections to employees of the DoD intelligence community who are not provided statutory protection by OSC.

With regards to protection for employees in intelligence or counter-intelligence positions, who are not protected by OSC, CRI chose as its first investigation a matter involving a protected disclosure into alleged intelligence activity against the United States at the Defense Intelligence Agency. This was a joint investigation by CRI and the Office of the

Inspector General at the National Security Agency (NSA). The effort provides a model for close cooperation between the DoD intelligence community and the DoD IG.

This concludes my statement. Ms. Deese, Mr. Meyer and I would be happy to respond to your questions.

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Mr. SHAYS. Thank you. I am just going to tell all of you, I will want you to relate what you are telling me, in theory and maybe in practice, how it interfaces with what you have heard. That will be helpful to me.

Mr. Fine.

STATEMENT OF GLENN FINE

Mr. FINE. Thank you, Mr. Chairman, and thank you for inviting me to testify about the role played by the Department of Justice Office of the Inspector General and the procedures we follow for investigating whistleblower complaints in the FBI.

Whistleblowers serve a valuable function in exposing waste, fraud, and abuse in Government programs, and in so doing they deserve protection from retaliation. Although FBI employees are specifically excluded from the Whistleblower Protection Act, at Congress's direction the Department of Justice has implemented a process for investigating allegations by FBI employees who allege that they have been retaliated against for making protected disclosures. Under this process, the OIG and the Department's Office of Professional Responsibility share jurisdiction for investigating allegations of reprisal by FBI whistleblowers.

In my written statement, which I will not repeat here, I describe in detail the procedures applicable to FBI employees and how the OIG investigates claims of retaliation. In the last 5 years, the OIG has initiated 25 investigations into allegations of reprisal raised by FBI employees. The allegations vary from poor performance reviews to termination of the employee. We have devoted significant resources to investigating these cases. They often involve a large number of interviews and result in detailed reports setting forth our findings. The complaints involve difficult issues, such as determining if the stated reasons for the personnel action are credible or if the actual motive was to retaliate for a protected disclosure.

The OIG views an allegation of retaliation as a serious matter. Even in cases where the complainant does not qualify for whistleblower protection, the OIG can investigate the allegations, and we often do. One recent example is noteworthy. In a matter involving Sibel Edmonds, an FBI contract linguist who did not qualify for whistleblower protection because she was not an FBI employee, the OIG investigated her complaints and concluded that the allegations of misconduct she raised were a contributing factor in why the FBI terminated her services.

I would like to now address the complaints raised by former FBI Agent Mike German, who testified earlier. We found that an FBI official had retaliated against him for raising concerns about how the FBI was handling an investigation in Orlando, FL. We also found that the FBI mishandled the Orlando investigation, including failing to properly document meetings and altering documents. However, after our independent review of the evidence, including the key transcript of the meeting between an FBI confidential informant and the subjects of the investigation and recordings of other meetings, we did not find that the underlying FBI investigation represented a viable terrorism case. The OIG carefully reviewed the evidence, some of which Mr. German did not have ac-

cess to, to reach that conclusion. In fact, this was the same conclusion reached by the FBI in two separate reviews of the matter.

I know Mr. German disagrees with this conclusion, but in our view, this is what the evidence showed. While the OIG is not hesitant to criticize the FBI or substantiate the claims of a whistleblower, in this case our investigators did not find the evidence substantiated all of Mr. German's complaints. But they did substantiate many.

Finally, a main topic of this hearing concerns retaliation against whistleblowers through suspension or revocation of their security clearances. According to OIG records, since enactment of the FBI whistleblower regulations in 1999, the OIG has not received any complaints from FBI employees alleging that their security clearances were suspended or revoked in retaliation for making a protected disclosure.

Moreover, the Department of Justice has a process for FBI employees to appeal security revocations. In 1997, the DOJ created the Access Review Committee [ARC], to hear appeals from any DOJ employee whose security clearance has been revoked or denied by any DOJ component, including the FBI. We asked ARC officials whether they were aware of any appeal in which the employee alleged that a security clearance was revoked in retaliation for a protected disclosure. They also did not believe there had been any such complaints.

In conclusion, whistleblowers who raise good-faith allegations of misconduct about activities in their agencies play an important role in ensuring transparency and accountability throughout the Government, and the OIG will continue to expend significant resources to investigate allegations of whistleblower retaliation raised by FBI employees.

That concludes my statement. I will be pleased to answer any questions. Thank you very much.

[The prepared statement of Mr. Fine follows:]

Office of the Inspector General
United States Department of Justice

Statement of

Glenn A. Fine
Inspector General, U.S. Department of Justice

before the

House Committee on Government Reform
Subcommittee on National Security, Emerging Threats, and International Relations

concerning

The Office of the Inspector General's Role in Investigating Whistleblower Complaints in the Federal Bureau of Investigation

February 14, 2006

Statement of Glenn A. Fine
Inspector General, U.S. Department of Justice,
before the
House Committee on Government Reform
Subcommittee on National Security, Emerging Threats,
and International Relations concerning
The Office of the Inspector General's Role in Investigating
Whistleblower Complaints in the Federal Bureau of Investigation
February 14, 2006

Mr. Chairman, Congressman Kucinich, and Members of the Subcommittee on National Security, Emerging Threats, and International Relations:

Thank you for inviting me to testify about the Department of Justice (Department or DOJ) Office of the Inspector General's (OIG) procedures for investigating whistleblower complaints in the Federal Bureau of Investigation (FBI). Whistleblowers serve as an important resource to the OIG in our oversight of the Department of Justice by helping to identify potential deficiencies in Department programs and operations or potential misconduct by Department employees and contractors.

With respect to FBI whistleblowers, the OIG plays a central role in investigating their allegations of retaliation. Although FBI employees are specifically excluded from the Whistleblower Protection Act of 1989 (which covers most other federal employees), Congress required, and the Department has implemented, a separate process for investigating allegations from FBI employees who complain of retaliation for making whistleblower disclosures. As discussed in my testimony, according to regulations established by the Department of Justice in 28 C.F.R. Part 27, the OIG and the Department's Office of Professional Responsibility (DOJ OPR) share responsibility for investigating allegations of reprisal raised by FBI whistleblowers.

In this statement, I will summarize the current whistleblower procedures applicable to FBI employees and describe how the OIG reviews and investigates claims of retaliation by FBI employees. Second, I also will explain the OIG's role in handling complaints under the Intelligence Community Whistleblower Protection Act. Third, I will address revocation of security clearances in retaliation for protected whistleblower disclosures and explain the procedures that would apply to an FBI employee making those claims within the Department of Justice.

I. OVERVIEW OF FBI WHISTLEBLOWER PROCEDURES

In amending the Civil Service Reform Act of 1978 (CSRA), the Whistleblower Protection Act of 1989 (WPA) established the United States Office of Special Counsel (OSC) as an independent Executive Branch agency. Separate from the Merit Systems Protection Board (MSPB), OSC has the authority to investigate and seek relief for prohibited personnel practices, including retaliation against whistleblowers. Most federal employees who believe they have been subjected to reprisal for making a protected disclosure under the WPA may request an investigation by OSC or, in appropriate circumstances, pursue an individual right of action before the MSPB. See 5 U.S.C. §§ 1214 and 1221. This is the process that most DOJ employees, except those from the FBI, would follow if they believe that they have been retaliated against for making a protected disclosure. In these cases, the OIG normally has no role in reviewing the alleged retaliation.

However, the WPA does not cover employees of agencies excluded from the CSRA, such as the FBI, the Central Intelligence Agency, and several other intelligence agencies. See 5 U.S.C. § 2302(a)(2)(C). Instead, the CSRA directed the Attorney General to promulgate regulations to ensure that FBI employees who make protected disclosures are not retaliated against "in a manner consistent with applicable provisions of sections 1214 and 1221 of [Title 5]," the provisions which govern OSC investigations of alleged retaliation for protected disclosures, the corrective actions that may be taken, and the individual rights of action that may be pursued.

In 1997, the President directed the Attorney General to develop the regulations specified in section 2303. See Presidential Memorandum, Delegation of Responsibilities Concerning FBI Employees Under the Civil Service Reform Act of 1978. In response to the directive, the Attorney General issued policies that authorized the OIG or DOJ OPR to investigate retaliation complaints from FBI employees, and the DOJ began developing regulations to implement the President's directive. In 1999, the Department promulgated these regulations, entitled "Whistleblower Protection for Federal Bureau of Investigation Employees," which in large measure are based on the pertinent provisions of the WPA. See 28 C.F.R. Part 27.

These FBI whistleblower regulations were designed to protect an FBI employee from retaliation for making disclosures that the employee reasonably believes evidences a "violation of any law, rule or regulation; or [m]ismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to the public health or safety."

In order to be considered a "protected disclosure" under the regulations, an FBI employee's complaint must be made to specified individuals or offices listed in the regulations. These individuals and offices are the Attorney General, Deputy Attorney General, FBI Director, FBI Deputy Director, the highest ranking official in any FBI field office, the OIG, DOJ OPR, or FBI OPR.

If the FBI employee makes a protected disclosure to one of these specified individuals or entities, the regulations prohibit any FBI or DOJ employee from taking or failing to take, or threatening to take or fail to take, a "personnel action" against the FBI employee as a reprisal for the protected disclosure. A personnel action includes promotion, discipline, transfer, termination, or any other significant change in duties.

If the employee believes that he or she has been the subject of a personnel action as a reprisal for making a protected disclosure, the employee may report the alleged reprisal to either the OIG or DOJ OPR. However, while the OIG receives some whistleblower complaints directly from FBI employees, many FBI complainants provide their allegations of retaliation to officials in the FBI, who forward them to the OIG and to DOJ OPR.[1]

Under the FBI whistleblower regulations, the OIG and DOJ OPR share responsibility for investigating allegations of whistleblower retaliation against FBI employees. When the OIG or DOJ OPR receives a complaint of retaliation by an FBI whistleblower, the OIG and DOJ OPR discuss the complaint and jointly decide whether the allegation is covered by under the FBI whistleblower regulations. If the complainant has made a protected disclosure and alleges reprisal for that disclosure, the OIG and DOJ OPR then jointly decide which of the two offices will conduct the investigation.

The investigation attempts to "determine whether there are reasonable grounds to believe that there has been or will be a reprisal for a protected disclosure." 28 C.F.R. § 27.3(f). To investigate the allegations of retaliation, the OIG normally interviews the complainant, relevant witnesses, and the subject, and reviews pertinent documents. In addition to investigating allegations of retaliation raised by FBI employees, the OIG also can investigate the allegations contained in the underlying protected disclosure. These allegations are complex and often

[1] Prior to 2004, FBI OPR received most of the complaints and referred them to the OIG and DOJ OPR. In a February 2004 restructuring of FBI OPR, the FBI moved FBI OPR's investigatory functions to the Internal Investigations Section of the Inspection Division. Currently, the OIG receives many of its whistleblower complaints directly from the FBI's Inspection Division.

require difficult judgments regarding the evidence to determine whether the underlying allegations can be substantiated.

Under the regulations, the OIG provides the FBI employee who raised the allegation of reprisal periodic reports during the course of the investigation about the status of the investigation.

At the completion of the investigation, the OIG provides the FBI employee with a statement of the proposed findings and conclusions, and the employee is given an opportunity to comment. The OIG then considers comments submitted by the complainant and makes any appropriate changes based on the comments. The OIG must then provide the complainant a final statement of the relevant facts, the conclusions, and a response to comments by the employee. The OIG's statement may not be used as evidence in any subsequent proceeding without the consent of the employee.

If the OIG or DOJ OPR finds reasonable grounds to believe that there has been or will be a reprisal for a protected disclosure, the OIG or DOJ OPR transmits the report relating to the findings of retaliation to the Department's Director of the Office of Attorney Recruitment and Management (OARM), along with any recommendations for corrective action. Even if the OIG or DOJ OPR investigation does not find reasonable grounds to believe that there has been retaliation, the FBI whistleblower may present his complaint of retaliation and request for corrective action directly to OARM. In such a case, the OIG's findings are not considered as part of the process unless the complainant introduces it.

The regulations impose time limits on when the FBI employee can submit to OARM a request for corrective action. The employee must file the request either (a) within 60 days of receiving notification from the OIG or DOJ OPR that the office terminated the investigation into the retaliation complaint, or (b) any time after 120 days from the date that the employee first notified the OIG or DOJ OPR of the alleged reprisal.

For OARM to have jurisdiction to hear the claim, the employee must make a non-frivolous allegation that the employee made a protected disclosure that was a contributing factor in the FBI's decision to take a personnel action against the employee. Former FBI employees also may bring claims to OARM, so long as the protected disclosure, the alleged reprisal, and the report of the alleged reprisal to the OIG or DOJ OPR occurred during their FBI employment.

The employee and the FBI may engage in discovery pursuant to the OARM proceeding that is relevant to the employee's claim of

retaliation. The employee also may request a hearing, but OARM can decide the case based solely on written evidence.

For the OARM to order corrective action, it must find that the employee has proven by a preponderance of the evidence that the employee made a protected disclosure that was a contributing factor in the personnel action at issue. If so, the FBI can negate that finding by establishing by clear and convincing evidence that it would have taken the same personnel action against the employee in the absence of the protected disclosure.

If the employee is not satisfied with the determination of the OARM Director, the employee may appeal the matter to the Deputy Attorney General.

II. OIG'S HANDLING OF RETALIATION COMPLAINTS

In the last 5 years, the OIG has initiated more than 25 investigations into allegations of reprisal from FBI employees. The types of allegations of reprisal vary, ranging from complaints about a poor performance review to termination of the employee. We have devoted significant resources to these investigations over the years. They often involve a large number of interviews, polygraph and forensic examinations, and detailed reports setting forth our findings. The complaints involve complex issues that require significant time and resources to address, such as determining the motive for the personnel action. The investigators in these matters have the complicated and difficult task of trying to determine if the stated reasons for the personnel action are credible or if the actual motive was to retaliate for a protected disclosure.

The OIG generally does not publicize its findings from whistleblower investigations, given the FBI whistleblower requirements and the privacy interests of subjects, witnesses, and complainants. Nonetheless, we have provided several such reports to congressional committees in response to formal requests. As noted above, pursuant to the regulations, we also provide the complainant with our findings on the retaliation allegations.

The OIG views an allegation of retaliation as a serious matter. Even in cases where the complainant does not qualify for whistleblower protection under the regulations, the OIG can investigate the allegations. For example, in a matter involving Sibel Edmonds, an FBI contract linguist who did not qualify for whistleblower protection under the regulations because she was not a permanent FBI employee, the OIG investigated the matter and concluded that her allegations of misconduct

were at least a contributing factor in why the FBI terminated her services. The OIG also concluded that by terminating her under these circumstances, the FBI's actions could have the effect of discouraging others from raising similar concerns. We also have investigated other cases involving alleged retaliation that did not involve protected disclosures under the FBI whistleblower regulations, including allegations of retaliation raised by John Roberts, a former Unit Chief in FBI OPR.

III. INTELLIGENCE COMMUNITY WHISTLEBLOWER PROTECTION ACT OF 1998

In addition to its responsibilities to review and investigate allegations raised by FBI whistleblowers, by statute the OIG is designated to receive and assess the credibility of complaints under the Intelligence Community Whistleblower Protection Act of 1998, which was codified as section 8H of the Inspector General Act.

Section 8H sets forth a procedure for employees and contractors of specified federal intelligence agencies, including the FBI, to report complaints or information to Congress about serious problems involving intelligence activities. Under the provisions of section 8H applicable to the FBI, an FBI employee or contractor who intends to report to Congress a complaint or information of "urgent concern" involving an intelligence activity may report the complaint or information to the DOJ OIG. Within a 14-day period, the OIG must determine "whether the complaint or information appears credible," and upon finding the information to be credible, thereafter transfer the information to the Attorney General who then submits the information to the House and Senate Intelligence Committees. If the OIG does not deem the complaint or information to be credible or does not transmit the information to the Attorney General, the employee may provide the information directly to the House and Senate Intelligence Committees. However, the employee must first inform the OIG of his or her intention to contact the intelligence committees directly and must follow the procedures specified in the Act.

The Act defines "urgent concern" as a "serious or flagrant problem, abuse, violation of law or Executive order, or deficiency relating to the funding, administration, or operations of an intelligence activity involving classified information, but does not include differences of opinions concerning public policy matters"; a false statement to Congress; and taking or threatening to take certain personnel actions in retaliation for making the report to Congress.

Since this legislation was enacted in October 1998, the DOJ OIG has not received any complaints under this statute.

IV. REVOCATION OF EMPLOYEE SECURITY CLEARANCES AS A FORM OF REPRISAL

One of the topics of this hearing concerns retaliation against national security whistleblowers by arbitrarily suspending or revoking their security clearances. Since enactment of the FBI whistleblower regulations in 1999, the OIG has no record of receiving any complaints from FBI employees who have alleged that their security clearances were suspended or revoked in retaliation for making a protected disclosure.

The Supreme Court ruled in a 1988 decision that the MSPB did not have authority to review a personnel action that involved revoking or denying an employee's security clearance. Case law involving the MSPB is not binding on OARM, but according to OARM's website such case law is "instructive." Under this interpretation, revoking an employee's security clearance in retaliation for a protected disclosure would not qualify as a "prohibited personnel action" under the FBI whistleblower regulations. Nevertheless, the OIG would have the authority to investigate an allegation that an employee's security clearance had been revoked in reprisal for a protected disclosure under its general authority to investigate allegations of misconduct, fraud, waste, or abuse within the Department.

Within the FBI, the Personal Security Adjudication Section of the FBI's Security Division makes determinations about revocations or denials of employee security clearances. In the last two years, the FBI Security Division revoked the security clearances of six employees and three contractors. According to officials in the Security Division, the most common reason for revoking a security clearance is concern about the employee's financial responsibilities. The FBI officials also said that they were not familiar with any case in which an employee alleged that revocation or denial of a security clearance was in retaliation for a protected disclosure.

Pursuant to Executive Order 12968 (1995) and 28 C.F.R. Part 17, the Department of Justice has implemented a process for reviewing security clearance revocations and denials involving DOJ employees, including those at the FBI. In 1997, the DOJ created the Access Review Committee (ARC) to hear appeals from DOJ employees whose security clearances have been revoked or denied by any DOJ component, including the FBI. The ARC hears several appeals each year, and appeals from FBI employees represent the highest number among the DOJ components. In preparation for this hearing, we asked several officials affiliated with the ARC whether they were aware of any appeal in which the employee alleged that the revocation was retaliation for a

protected disclosure. These officials said they did not believe there have been any such complaints.

In conclusion, whistleblowers who raise good-faith allegations of misconduct about activities at their agencies play an important role in ensuring transparency and accountability throughout government. The OIG will continue to expend significant resources to investigate allegations of whistleblower retaliation raised by FBI employees.

This concludes my statement, and I would be pleased to answer any questions.

Mr. SHAYS. Thank you very much.
Mr. Friedman.

STATEMENT OF GREGORY H. FRIEDMAN

Mr. FRIEDMAN. Good night, Mr. Chairman.
Mr. SHAYS. Oh, not yet. You are not free to leave yet. [Laughter.]
Mr. FRIEDMAN. I am pleased to be here at your request to testify on whistleblower protection at the Department of Energy. We share your concern that whistleblowers be free to express themselves without fear of retaliation. The willingness of whistleblowers to step forward is absolutely vital and essential to the mission of the Office of Inspector General and to the pursuit of good government.

The Department of Energy has approximately 15,000 Federal employees and 100,000 contractor employees. The Office of Inspector General typically receives over 1,000 contacts a year from these employees and other persons raising concerns about aspects of departmental operations. We consider all of these individuals to be whistleblowers whether or not they request formal status.

My full testimony describes the body of our work in the whistleblower protection area. Let me simply say that, as I have testified previously before Congress, in my view the single most important element in this process and in improving the process in relationship to the testimony that you received earlier—which is the question that you have posed—is ensuring that the various departments and agencies promote an environment where both Federal and contractor employee concerns can be raised and addressed without fear of retaliation. We take our role in this process seriously and will continue to do so.

Let me share with you five points, hopefully tied in to getting to the root cause of the problems that you heard discussed earlier today, which I think are important considerations that warrant your attention.

First, there is a problem, clearly, with timeliness of the processing of retaliation complaints, and in this case the delay, in essence, festers and causes all sorts of redundant problems that occur following the core and the root issue itself.

Second, there needs to be a level of management support for whistleblowers. That is, the tone at the top at each of the agencies, each of the departments needs to suggest that we have an environment, we promote an environment, we insist upon an environment in which whistleblowers are free to express their views.

Third, the communication between the departments and whistleblowers and the IGs and whistleblowers need to be improved.

Fourth, I think there may be merit in the increased use of mediation and arbitration to facilitate the resolution of concerns.

Finally, it is absolutely imperative, in my view, to hold Federal and contractor officials accountable for their actions with respect to whistleblowers.

I will be pleased to answer your questions.

[The prepared statement of Mr. Friedman follows:]

STATEMENT OF GREGORY H. FRIEDMAN
INSPECTOR GENERAL
U. S. DEPARTMENT OF ENERGY

BEFORE THE
U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON GOVERNMENT REFORM
SUBCOMMITTEE ON NATIONAL SECURITY,
EMERGING THREATS, AND INTERNATIONAL RELATIONS

FOR RELEASE ON DELIVERY
Tuesday, February 14, 2006

Good afternoon Mr. Chairman and members of the Subcommittee. I am pleased to be here at your request to testify on whistleblower protection at the Department of Energy. We share your concern that whistleblowers be free to express themselves without fear of retaliation. The willingness of whistleblowers to step forward and disclose information is vital to the mission of the Office of Inspector General and to the pursuit of good government.

The Department of Energy has approximately 15,000 Federal employees and 100,000 contractor employees. The Office of Inspector General typically receives over 1,000 contacts a year from these employees and other persons raising concerns about aspects of Departmental operations. These include allegations of programmatic fraud, waste, and abuse; safety and security violations; and, a variety of other issues concerning Departmental activities. We consider all of these individuals to be whistleblowers, whether or not they request formal status.

We carefully review each complaint we receive. Depending upon the nature of the issues raised by a complainant, we may open an audit, inspection, or investigation. For example, last year, allegation-based investigations resulted in the referral of 33 cases for prosecution, 20 criminal convictions and civil judgments, and, over $27 million in settlements and fines. Information provided by whistleblowers played a critical role in these outcomes.

Before discussing specific Office of Inspector General work related to whistleblowers, I would like to discuss whistleblower protection policies in general.

Whistleblower Policies

Department of Energy Federal and contractor employee whistleblowers have access to the protections found in several statutes and regulations. Two avenues routinely used are:

- First, the Whistleblower Protection Act, which covers Federal employees alleging reprisal for providing information about a violation of any law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety; and,
- Second, the Department of Energy Contractor Employee Protection Program, which covers on-site contractor employees alleging reprisal for disclosing information concerning danger to the public or worker health and safety, substantial violations of law, or gross mismanagement; participation in congressional proceedings; or refusal to participate in dangerous activities.

The Department recently issued for comment a draft directive addressing the protection of Department employees who express what are described as "differing professional opinions." The objectives of the directive, as stated in the draft, are to help ensure that Department employees are free to express differing views and that there is an adequate process for considering dissenting views and resolving these differences. The draft is only a policy statement, so there is no definitive Departmental implementation plan. As currently drafted, the directive applies only to Federal employees. We believe that it may be wise to include contractor employees in the directive's coverage and have expressed our view on this issue to responsible Departmental officials.

Office of Inspector General Whistleblower-Related Activities

Now I would like to address specific whistleblower-related activities of the Office of Inspector General. Pursuant to interest expressed in your letter of invitation, I will first discuss whistleblower retaliation through the personnel security clearance process.

In the last 10 years, the Office of Inspector General has received three complaints specifically alleging retaliation through the personnel security clearance process. In the first complaint, which we received in 1995, a Department contractor employee alleged he was not granted a security clearance in retaliation for disclosing unethical business practices by his employer. Our inquiry did not substantiate the allegation.

In the second complaint, which we received on November 29, 1996, a Department employee alleged that during his security clearance background reinvestigation his managers reported that he was mentally and emotionally unstable because he had voiced concerns about wrongdoing in the Department. The complainant specifically expressed concern that the Department had received the completed background investigation over a year previously, but had yet to make a determination whether to continue or revoke his clearance. On January 15, 1997, the complainant advised us that the Department had made a decision to continue his clearance. While this appeared to be a positive outcome, we nonetheless advised Department management of the issues the complainant had raised regarding the clearance process, so appropriate action could be taken.

In the third complaint, which we received in 2000, it was alleged that a Department contractor employee's clearance was revoked for raising concerns regarding the illegal transfer of project funds. We engaged Department management on this issue. It was determined that, in fact, the clearance had not been revoked.

In addition, in 2002, a Department employee wrote to the Secretary of Energy alleging that her security clearance was revoked and that Department officials falsely claimed that budgetary considerations prevented the Department's standard review of her clearance as a pretext for prohibited reprisal for equal employment opportunity and other protected activity. Because the complaint was also sent to the Office of Special Counsel, which has primary jurisdiction for resolving such a complaint, we deferred to the Special Counsel on this matter.

Looking at whistleblower protection more broadly, the Office of Inspector General has been active in a number of other cases. For example, in November 2002, we initiated an inquiry into allegations that senior management at Los Alamos National Laboratory engaged in a deliberate cover-up of security breaches and illegal activities, particularly with respect to reported instances of property loss and theft. Shortly after our review began, the Laboratory terminated the employment of two security officials who had been vocal in criticizing management's handling of property loss and theft issues. The timing of this action raised the specter that the terminations were retaliatory in nature; therefore, we incorporated an examination of the firings into our inquiry. We evaluated the reasons for the terminations that were cited by management and determined that a substantial number of them did not withstand scrutiny. We found that the Laboratory's decision to remove the two officials was, as we stated at the time,

incomprehensible. Our report, which was issued in January 2003, concluded that the events addressed by our review raised doubt about the Laboratory's commitment to solving noted problems and had a potential chilling effect on employees who may have been willing to speak out on matters of concern. Subsequently, the University of California, which operates the Laboratory for the Department, rehired the two terminated employees, entered into a financial settlement with them, and took adverse personnel action against a number of individuals involved in the mismanagement described in our report.

More recently, we have examined whether the Department appropriately followed up on the results of a 2001 survey on the effectiveness of its overall Employee Concerns Program. The Program was established to ensure that Federal and contractor employee concerns related to the management of Department programs and facilities are addressed. We have issued a draft report on the results of our review. We found that essentially no action had been taken to ensure consistent, uniform implementation of the survey recommendations. Since the survey was conducted approximately four years ago, we concluded that the Department should conduct a new survey to gauge the shift, if any, in the views of its approximately 115,000 Federal and contractor employees. Management then needs to ensure that timely follow-up action is taken regarding the results of the survey. We are awaiting management's comments on our draft report.

The Office of Inspector General also has committed extensive investigative and other resources to address the concerns of whistleblowers who file lawsuits under the False Claims Act. The *qui tam* provision of the Act allows private citizens to file a lawsuit, in the name of the U.S. Government, charging fraud by Government contractors. These *qui tam* lawsuits may involve allegations of

double-billing, charging the Government for expenses not incurred, falsely certifying test results, and other fraud schemes. We work closely with the Department of Justice on these cases. The Office of Inspector General has approximately 25 open *qui tam* investigations. The current inventory reflects alleged fraud totaling nearly $200 million. The benefit of this process can be gauged by the fact that over the past five years our *qui tam* investigations have led to settlements totaling over $100 million, a portion of which was shared with the whistleblowers.

Conclusion

As I have testified previously before the Congress, it is important that the Department promote an environment where both Federal and contractor employee concerns can be raised and addressed without fear of retaliation. We take our role in this process seriously and will continue to do so.

Mr. Chairman and members of the Subcommittee, this concludes my statement. I will be pleased to answer any questions.

Mr. SHAYS. I would like each of you to give me the justifications of why we should treat national security employees any differently than we treat any other employee.

Mr. MCVAY. Mr. Chairman, as I said in my testimony——

Mr. SHAYS. This time I don't think your mic is on.

Mr. MCVAY. I apologize.

As I said in my testimony, we defer to those who have expertise in this area. We have not been involved in the investigation, prosecution, or in attempting, if you will, to seek corrective action for these individuals. We don't know what the effect of OSC authority going into these situations would be on other national security issues. And so we would defer to those who have been in this area, such as these IGs you have before you today.

Mr. SHAYS. Is that a no or a yes?

With all due respect, I think what you were saying is you are not allowed to have an opinion, or you don't have an opinion?

Mr. MCVAY. We do not have an opinion, sir.

Mr. SHAYS. OK. Mr. Gimble.

Mr. GIMBLE. Mr. Chairman, we take the whistleblower protection business very seriously. And I think the thing that I would just leave with this is that we have put together an instruction in DOD that would formalize and give the intelligence community participants in DOD the knowledge that we are going to investigate very rigorously any of the reprisal actions.

Now, is that covered in the statute? We believe it is covered under the auspices of the IG Act. The clarity of all the other places, maybe it leaves something open to discussion, but we think that we have the responsibility and the authority to give those folks the protection that they need.

Mr. SHAYS. And it is good that you feel that way since you are in charge of it. But tell me why the process should be any different for those who are involved in national security issues. Why should the process for protecting a whistleblower be any different?

Mr. GIMBLE. You are talking about from the standpoint of if we take the Title 5 civilians? I have several groups of people that I am responsible for and I have three separate pieces of legislation under Title 10 because our responsibility for reprisal investigations considers the overall encompassing Whistleblower Protection Act of Title 5 that would cover most of the employees. The only carve-out of that is the intelligence people that we have in our Defense intelligence agencies.

I personally think at the end of the day we can investigate those under the auspices of the Inspector General Act——

Mr. SHAYS. I know you can do them, but I want to know why we would want to do it differently. What is the argument?

Mr. GIMBLE. Well, the argument would be the actual investigation is not different. When we do an investigation under—either way, we would do the same process.

Mr. SHAYS. OK.

Mr. GIMBLE. It is just the authorities. We would rely on the authorities of the IG Act if we were looking at—if someone were to question us, which would be highly unlikely, but we would rely on the authorities of the IG Act. We think we have statutory authority to do that, and then the process of the actual investigations, it is

just a normal process that we would go through, our investigative procedures.

Mr. SHAYS. Mr. Fine, why would we want to treat an FBI agent who speaks out differently than an employee of the Commerce Department?

Mr. FINE. Well, let me say, I am not here on behalf of the Department. The Department would be the best one to answer that question. I think that they would argue that there is sensitive classified information involved with that, and allowing that to go outside the agency to a quasi-judicial body like the MSPB might create problems. They might also argue that they want to have the expertise internally to the Department to investigate these matters and to know where the FBI procedures are and what the problems are and have an internal OIG investigator investigate that matter.

But it is not my position here to be advocating that. We are here to aggressively investigate under the scheme that Congress and the administration works out, and that is what we try to do.

Mr. SHAYS. Basically you are saying to me that you would do whatever you are asked to do based on the law, and I appreciate that. But you deal with this issue as it relates to security issues and I would think you would have insights as to why we would have to handle it differently.

Mr. FINE. I think the first reason would be the issue about sensitive and classified information going outside the Department. I think a second issue would be whether an alternative structure would be any better. Would it be better to have OSC, for example, investigate all these matters? I am not sure it necessarily would or that record would be significantly different.

Mr. SHAYS. But maybe what we could have is we could have those who are in classified positions collectively—FBI, DIA, whatever, the military, NSA—all come under the same uniform standard, but it would separate from Commerce, that you would handle, for instance, Mr. McVay, you would handle someone from Commerce, correct?

Mr. MCVAY. Yes, sir.

Mr. SHAYS. And model it—I mean, if we have a good model, or if we can make it better——

What troubles me is I feel like it is Enron investigating Enron. So, help me out on that one.

Mr. FINE. I don't think it is Enron investigating Enron. The OIG, the Inspector General is independent. And if you look at any of our reports, we are not hesitant to criticize the FBI, and have often done that. The Sibel Edmonds case, the foreign language translation program, the report on the handling of September 11th intelligence—report after report, we are not hesitant to criticize the FBI. We don't consider ourselves a part of the FBI. We are independent of the FBI. And I think that is the critical issue. We view ourselves as aggressive and tough, but fair, and that is what we try to apply both to our audits, our investigations, and our——

Mr. SHAYS. See, I would tend to say that you are a bit removed. It is Justice over the FBI; it is not FBI over Justice. But that is not the way it is in some other agencies and departments.

Mr. FINE. Well, I can't speak for other agencies but I can speak for us, and we consider ourselves separate, independent, and out

to provide an objective and fair investigation, not to carry anybody's water.

Mr. SHAYS. Mr. Friedman.

Mr. FRIEDMAN. Well, I am inclined to answer your question, Mr. Shays, in the sense that the outcome is what is really important. And I don't think there should be any difference in getting to the outcome regardless of whether the person is an intelligence community whistleblower, a national security community whistleblower, or a person who is not in any of those fields. There are ministerial issues associated with classification and all the rest that have to be addressed, and I am not sure that, you know, at this hour, under these circumstances, I can give you a precisely how those ought to be resolved. But I think they should be treated essentially the same.

Mr. SHAYS. In the case of Mr. Levernier, I have particular sensitivity to this issue because what he saw, obviously, as an employee, I saw and my subcommittee staff saw in our investigation and our actual site visits. I think he was dead right. But he has suffered tremendously.

So tell me how the system works for him.

Mr. FRIEDMAN. Well, I would say from his perspective, certainly, the system has not worked. But let me tell you what—because he did not bring that particular allegation to us, and therefore we don't know how it might have turned out. I am not saying it would have been positive, but I certainly don't know that it would have been negative.

But what I would say is this. His testimony is replete with references to our reports, which have supported the contentions that he made in making his charges. He refers as well to a 1999 report by the President's Foreign Intelligence Advisory Board, which I think was chaired at the time by Senator Rudman, which was very critical of security in the Department of Energy, and our reports are referenced aggressively in that report as well. And finally, in the last 3 or 4 years, in the same vein that Mr. Levernier brought to your attention, we have issued over 50 security reports entirely consistent with the views that you have sensed when you have been out making site visits or had hearings on these issues.

Mr. SHAYS. I guess I would like all of you—and then I will go to Mr. Kucinich—I had a family member who we cheered on when he refused to shave off his nice white beard when his boss said you need to shave it. And we thought it was terrific he stood up to his boss. He was in his mid-50's. He retired at 62. And we learned later he never got a raise from that point on. And so his loved ones had basically encouraged him to do something that caused him tremendous harm over something that may have been, in the end, somewhat superficial.

I guess what I am wondering is, based on your comments, if you, Mr. Friedman, have supported his basic intentions and he still ended up the way he ended up, does that just say that it is impossible to protect a whistleblower? Because even if you deal with everything you can for them, they are not going to get the promotions they want and——

Mr. FRIEDMAN. Mr. Chairman, I would not conclude that it is impossible to protect whistleblowers. I would conclude that the system——

Mr. SHAYS. It is difficult.

Mr. FRIEDMAN [continuing]. Is extremely difficult. Yes.

Mr. SHAYS. Even if you carry out the law and seek to protect them as much as you can, in the end it is very possible they won't get that promotion even—whatever.

Mr. FRIEDMAN. Yes. But can I go back to the five suggestions I left you with earlier, if I can?

Mr. SHAYS. Sure.

Mr. FRIEDMAN. I identified "tone" at the top as being of critical importance, and I still believe that to be the case. There has to be an atmosphere that permeates throughout the entire organization that whistleblowers are to be respected and treated with dignity and listened to and their complaints adjudicated within the agency. That is a critically important first step. If there is no communication, if the person is ignored, if the person is shunted off to a corner and given no responsibility—it is very difficult from that point forward to remedy the situation. There is a total breakdown, from my experience.

Mr. SHAYS. Just this last point, involving Specialist Provance. I guess I am particularly touched by him because Abu Ghraib was a disaster that we will feel for decades. And maybe he should have been speaking out sooner. But I just don't know how DOD can feel comfortable when they hear about that case. So I don't know how an Inspector General can feel comfortable about it. Can you give me some reaction, Mr. Gimble, when you heard his case?

Mr. GIMBLE. Let me offer this. Ms. Deese has worked—we are aware of the case, to some extent, and maybe she can put a fuller picture as to what actually happened.

Mr. SHAYS. Sure.

Ms. DEESE. Thank you. I agree, it is disturbing, but Specialist Provance did not file a whistleblower reprisal complaint with our office. About a year and a half ago, at least a year and a half ago, his attorney did call. In fact, I spoke with his attorney, provided him information on the Military Whistleblower Protection Act, and, you know, talked with him quite a bit about it, if something did happen to the sergeant, then, you know, this is what he could do. But he did not file a complaint.

Mr. SHAYS. Was there an explanation why—and I should have—he was a sergeant no longer—is there an explanation as to why they didn't file?

Ms. DEESE. No, sir. Not——

Mr. SHAYS. And is there a deadline? So having not filed, then he is no longer able to——

Ms. DEESE. The guideline is 180 days, but within my office, and we handle hundreds and hundreds of reprisal complaints from military members, we go at least 6 months. And depending on the circumstances, you know, we will extend it.

Mr. SHAYS. But that would be part of his record forever, correct? I mean, even if he maintains his status as a sergeant, they can ask him to do whatever they want, and there is really no way to be able to deal with that issue. Correct? In other words, what happens

to him in the future? In other words, he just may, like my family member, be working for the next 7 years and never get a pay raise. In this case, he would get a pay raise as cost-of-living, but you get my gist.

So my question is, as you look at this, it would still be part of his record? It doesn't disappear from his record. If you were able to have protected his status as a sergeant, would there have been any protections for him in the future, or would there be something on his record that said he had to be reinstated or maintained because of what you all did for him—if you were able to maintain his position as a sergeant?

Do you understand my question?

Ms. DEESE. I think I do. If you file a reprisal complaint, then, you know, we have a very extensive system that we review all of the evidence. And if you are saying do we cutoff the complaints at any time after the unfavorable action was——

Mr. SHAYS. Have you ever done studies that checked to see what happened to someone that you protected, 5 or 10 years later? In other words——

Ms. DEESE. We do go by the law. You know, under 10 U.S.C. 1034, Congress said within 180 days or we have to tell the complainant why we haven't finished the case. But we do extend it.

Mr. SHAYS. I understand. No, I am asking this question. I think, Mr. Gimble, you know what I am asking.

Mr. GIMBLE. I think, to answer your question, if we had received the reprisal complaint and investigated it and in fact established that there had been reprisal, we would have recommended action such as maintaining rank and expunging the record to make the person whole again. What we are saying is that the complaint never came to us to investigate.

Mr. SHAYS. No, I understand that part. No, I am beyond that. I understand that. But there is no guarantee that he would not be leveled off and branded and—we can't really say to some woman, a whistleblower, you step forward, we're going to protect you, because we may be able to prevent through this process—you could maybe restore his rank, but there is nothing to guarantee that he has a bright future in the military after that. Is that correct?

Mr. GIMBLE. I think that is correct with anything. I think the only response I would have to that is if we were able to expunge this from the record at that point in time, you would think he would have a level playing ground to go forward. Nobody can guarantee that, but that is what——

Mr. SHAYS. OK, Mr. Kucinich.

Thank you, all.

Mr. KUCINICH. Thank you very much, Mr. Chairman.

Mr. Fine, in our first panel questioning, one of the witnesses, Mr. Tice, indicated that subsequent to his discussions with the New York Times, that he was contacted by people from the FBI. As the Inspector General having jurisdiction over Justice, how do you determine whether or not other agencies are using the FBI in an aggressive effort to try to silence or intimidate whistleblowers?

Mr. FINE. That is an important question, a good question. We have to be presented with that and presented with an allegation that this was an improper effort on behalf of the agency as well as

the FBI as well as the Department of Justice to go outside the law and do something that was improper in reprisal for whistleblower activities.

Mr. KUCINICH. You are familiar with the New York Times story?

Mr. FINE. I am.

Mr. KUCINICH. Which described for the Nation for the first time a domestic wiretapping going on without using FISA—in effect, warrantless wiretaps. The Justice Department, supposedly, according to published reports—is investigating to determine who gave the New York Times the information. The person or persons who gave the New York Times that information, by definition, are whistleblowers. Are they not?

Mr. FINE. Well, they by definition may be whistleblowers, but the issue is whether they made a protected disclosure within the agency or whether they went outside the agency and provided classified information in violation of some law.

Mr. KUCINICH. Who makes that determination?

Mr. FINE. I think the Department of Justice attorneys probably would, the prosecutors who are overseeing this case.

Mr. KUCINICH. And who makes the determination of the status of whether some person is a whistleblower or a law-breaker? I mean, isn't one person—you know, doesn't it become a political issue, then?

Mr. FINE. I think it is an issue of looking at what the statute provides and whether they made a protected disclosure to—in our case, it would be whether they made a protected disclosure to someone who was listed in the law as able to receive that protected disclosure; or whether they went outside that and went to the press and violated a law in so doing.

Mr. KUCINICH. Have you looked at it to the extent—have you looked at this case at all?

Mr. FINE. No, I haven't.

Mr. KUCINICH. OK. Mr. Gimble, we have heard witnesses in panel one discuss the so-called conflict of interest, with one agency investigating and prosecuting the retaliations by that agency against whistleblowers who are employees of the same agency. In other words, the agency accused of retaliating against a whistleblower is not only the defendant, but also the judge and the jury.

Is there an inherent conflict of interest in that?

Mr. GIMBLE. Sir, let me just answer the question this way. Typically, within the Department of Defense, if we get an allegation, we send it back to the lowest place. We have the oversight responsibility of overseeing that particular investigation, whether we do it or whether the, in this case, the NSA IG did it.

I think one of the things that we need to just maybe lay out here that wasn't really clear is in fact there were two investigations. The NSA IG performed their investigation and we went back and did a second investigation. So it was not that it went back just to them. It did go back, they did do the initial investigation; we did a subsequent investigation and came to our conclusions, I believe we sent the report up to this committee, I believe.

Mr. KUCINICH. Did you compare notes with the NSA while you were doing your investigation?

Mr. GIMBLE. We went in and looked to see what they did and what we thought needed to be additional work.

Mr. KUCINICH. Now, before coming here today, were you familiar with the case of the whistleblower, Sergeant Provance?

Mr. GIMBLE. Not really. I have never been involved. We did some research on it when we saw he was on the witness——

Mr. KUCINICH. You read the paper, though, right?

Mr. GIMBLE. Yes, sir.

Mr. KUCINICH. And there were numerous stories about Sergeant Provance blowing the whistle on the coverup of the Abu Ghraib scandal. I would like to enter some of those in the record, if I could.

Mr. SHAYS. Without objection.

[The information referred to follows:]

washingtonpost.com

Sergeant Says Intelligence Directed Abuse

By Josh White and Scott Higham
Washington Post Staff Writers
Thursday, May 20, 2004; Page A01

Military intelligence officers at the Abu Ghraib prison in Iraq directed military police to take clothes from prisoners, leave detainees naked in their cells and make them wear women's underwear, part of a series of alleged abuses that were openly discussed at the facility, according to a military intelligence soldier who worked at the prison last fall.

Sgt. Samuel Provance said intelligence interrogators told military police to strip down prisoners and embarrass them as a way to help "break" them. The same interrogators and intelligence analysts would talk about the abuse with Provance and flippantly dismiss it because the Iraqis were considered "the enemy," he said.

The first military intelligence soldier to speak openly about alleged abuse at Abu Ghraib, Provance said in a telephone interview from Germany yesterday that the highest-ranking military intelligence officers at the prison were involved and that the Army appears to be trying to deflect attention away from military intelligence's role.

Since the abuse at Abu Ghraib became public, senior Pentagon officials have characterized the interrogation techniques as the willful actions of a small group of soldiers and a failure of leadership by their commander. Provance's comments challenge that, and attorneys for accused soldiers allege that the techniques were directed by military intelligence officials.

In an interview, Brig. Gen. Janis L. Karpinski, the commander of U.S. detention facilities in Iraq at the time of the alleged abuse, claimed that military intelligence imposed its authority so fully that she eventually had limited access to the interrogation facilities. And an attorney for one of the soldiers accused of abuse said yesterday that the Army has rejected his request for an independent inquiry, which could block potentially crucial information about involvement of military intelligence, the CIA and the FBI from being revealed.

Provance was part of that military intelligence operation but was not an interrogator. He said he administered a secret computer network at Abu Ghraib for about six months and did not witness abuse. But Provance said he had numerous discussions with members of the 205th Military Intelligence Brigade about their tactics in the prison. He also maintains he voiced his disapproval as early as last October.

"Military intelligence was in control," Provance said. "Setting the conditions for interrogations was strictly dictated by military intelligence. They weren't the ones carrying it out, but they were the ones telling the MPs to wake the detainees up every hour on the hour" or limiting their food.

The 205th Military Intelligence Brigade's top officers have declined to comment publicly, not answering repeated phone calls and e-mail messages. Provance, a member of the 302nd Military Intelligence Battalion's A Company, signed a nondisclosure agreement at his base in Germany on Friday. But he said he wanted to discuss Abu Ghraib because he believes that the intelligence community is covering up the abuses. He also spoke to ABC News on Sunday for a program that was to air last night.

Provance was interviewed by Maj. Gen. George R. Fay -- who is looking into the military intelligence community's role in the abuse -- and testified at an Article 32 hearing, the military equivalent of a pretrial hearing, for one of the MPs this month. But Provance said Fay was interested only in what military police had done, asking no questions about military intelligence.

Gary R. Myers, a civilian lawyer representing one of seven MPs charged in the alleged abuse, Staff Sgt. Ivan L. "Chip" Frederick II, said his client does not claim he was ordered to abuse detainees, just that military intelligence outlined what should be done and then left it up to the MPs.

"My guy is simply saying that these activities were encouraged" by military intelligence, Myers said yesterday. "The story is not necessarily that there was a direct order. Everybody is far too subtle and smart for that. . . . Realistically, there is a description of an activity, a suggestion that it may be helpful and encouragement that this is exactly what we needed."

Myers says he fears that officials are covering up the involvement of senior military officers, and that military officials have dissected the investigation into several separate inquiries run by people who have potential conflicts of interest. Earlier this month Myers asked Lt. Gen. Thomas F. Metz, commander of the Army's III Corps in Iraq, to order a special "court of inquiry" to offer an outside, unbiased look at the scandal, as was done when a U.S. Navy submarine collided with a Japanese fishing boat near Hawaii in 2001.

In a short letter dated May 5, Metz declined. Provance said when he arrived at Abu Ghraib last September, the place was bordering on chaos. Soldiers did not wear their uniforms, instead just donning brown shirts. They were all on a first-name basis. People came and went.

Within days -- about the time Maj. Gen. Geoffrey D. Miller paid a visit to the facility and told Karpinski, the commanding officer, that he wanted to "Gitmo-ize" the place -- money began pouring in, and many more interrogators streamed to the site. More prisoners were also funneled to the facility. Provance said officials from "Gitmo" -- the U.S. detention facility at Guantanamo Bay, Cuba -- arrived to increase the pressure on detainees and streamline interrogation efforts.

"The operation was snowballing," Provance said. "There were more and more interrogations. The chain of command was putting a lot of resources into the facility."

Even Karpinski, who commanded the facility as the head of the 800th MP Brigade, had to knock on a plywood door to gain access to the interrogation wing. She said that she had no idea what was going on there, and that the MPs who were handpicked to "enhance the interrogation effort" were essentially beyond her reach and unable to discuss their mission.

It was about that same time that Karpinski felt that high-ranking generals were trying to separate military intelligence away from Abu Ghraib and the military police operation, so it would be even more secluded and secret. Karpinski said in a recent interview that she visited three sites in and around Baghdad with military intelligence officials who were scouting a new compound.

"They continued to move me farther and farther away from it," Karpinski said. "They weren't extremely happy with Abu Ghraib. They wanted their own compound."

ANTIWAR.COM PRINTTHIS

September 9, 2004

Soldier for the Truth: Sgt. Samuel Provance

by J. David Galland

Sgt. Samuel Provance sealed his fate as a soldier on May 21, 2004, when he went on record with ABC News. His experiences as a U.S. Army junior noncommissioned officer since committing one of the greatest imaginable mistakes in service – speaking out to the news media – have left him dazed, afraid, wondering and confused.

Today, finally, Sgt. Provance is in Washington, D.C., upon the request of Sen. Edward M. Kennedy (D, Mass.). Kennedy invited Provance to appear before the Senate Armed Services Committee to hear of his experiences on the ground at the Abu Ghraib prison and elsewhere in Iraq.

The road to Washington for this young Army NCO has not been pleasant. It has been a case study in how the Army deals with soldiers who struggle with conscience, when morality and the sense to "do the right thing" win out over going along.

What did Sam Provance do? He told the truth! In so doing he has indicted, as we come to learn, his military chain of command and many others who have been blamed for the "animal house" conditions of the Abu Ghraib prison in Baghdad.

One of the most guilty of all is his own brigade commander, Col. Thomas Pappas, commander of the embattled 205thMilitary Intelligence (MI) Brigade, headquartered in Wiesbaden Germany.

Since publicly telling the truth, Provance has experienced a number of incidents in which his Army superiors have attempted to break his will, embarrass and belittle him in the eyes of his peers, intimidate him to silence. The actual impact has been to further tar-brush the true guilty parties.

Sgt. Provance has had the guts to speak from his heart and say that he believed that the Army was involved in a cover-up as to the extent of prisoner abuse at Abu Ghraib prison. He also told ABC News that the sexual humiliation of Iraqi prisoners at Abu Ghraib began as a technique ordered by military intelligence interrogators. Although he had not personally witnessed this abuse, he certainly heard the internal scuttlebutt.

In fact, one evening earlier this year, Provance was driven home by Spc. Benjamin Heidenreich, also of the 205thM.I. Brigade. Heidenreich told Provance that he, Heidenreich, and Lt. Col. Steven Jordan – head of the Joint Interrogation and Debriefing Center at Abu Ghraib – had teamed up to beat up an Iraqi detainee at the prison.

Provance had served in the facility with Heidenreich during the period when the alleged abuse and total chaos prevailed in 2003. As an intelligence soldier with a top secret security clearance, it was Provance's job to administer a highly classified MI computer communication and data retrieval system.

This past spring Sgt. Provance found himself back at his home station in Weisbaden, Germany, with the 302nd MI Battalion. After he read Major Gen. Antonio Taguba's Article 15-6 investigation report, Provance became morally committed to exposing an Army whitewash and cover-up. He is not the only person so committed.

Even when Maj. Gen. George Fay was appointed to investigate further on April 23, 2004, examining the role that Military Intelligence personnel may have played in the abuses, Provance justifiably suspected that Fay's findings would sweep the dirt much deeper under the proverbial carpet. He had good reason to believe this after a face-to-face meeting with Major Gen. Fay.

When Fay interviewed Provance regarding what he saw, heard, or witnessed at Abu Ghraib, the young NCO stated that the general seemed interested in only the actions of the military police (MP) and not of the MI interrogators at the facility. It would be later on that same day that Heidenreich revealed to Provance the instances where MI personnel had abused prisoners.

In an attempt to further intimidate and ultimately muzzle Sgt. Provance, Fay threatened to take action against him for failing to report what he had seen or heard of, sooner. Provance explained to the general that he said nothing because he had no firsthand knowledge of prisoner abuse, and that he had also feared that he would be ostracized for speaking out.

The sergeant would eventually become intimately familiar with what *ostracized* really meant when the chain of command got serious about it.

Fay gave Provance a gag order at this point and discouraged him from speaking to anyone or testifying at any time. Fay told Provance to keep his mouth shut about these things if he valued his career.

As Provance and I both see it, keeping Provance silent would enable Fay to further shift the focus from the culpable MI personnel to the target audience of MPs that had already been portrayed by Army generals as "the real bad apples."

The final release of the Fay and Schlesinger reports would bear out Provance's concern. The reports found that MI interrogators and many other MI personnel were knee-deep in inappropriate actions, neglect, criminal malfeasance and dereliction of duty at the highest levels.

Following his first interview with Fay, and considering Fay's threats, Provance essentially considered himself the one who was inevitably going to carry some burden of punishment for "something" that the Army would devise. Thus, Provance felt that he had nothing to lose, and maybe justice and the truth to gain.

Convinced that the truth would never come out otherwise, Provance resolved to expose the cover-up to the media.

On May 18, Provance told ABC, "I feel like I'm being punished for being honest." With personal introspection, Provance noted, "If I didn't hear anything, I didn't see anything, I don't know what you're talking about, then my life would be just fine right now."

This was not good enough for Sgt. Sam Provance. He was raised by a different standard. He is an honest man.

Shortly after Provance talked to ABC and the stories broke in the media, I established personal contact with the sergeant and have maintained close contact to this day. I can confirm that the very predictable reprisals against Provance began to happen very quickly.

The day after the ABC story was published, Sgt. Provance's chain of command (headed by Col. Pappas), suspended his access to classified material. A military intelligence soldier without access to classified material is virtually worthless in his or her profession.

Next, his chain of command administratively "flagged" the sergeant. This is akin to setting a soldier's feet firmly in a vat of concrete as far as any personnel action is concerned.

Sgt. Provance was now in a command-imposed limbo. His chain of command told him that he might face prosecution because his comments to ABC were not "in the national interest."

Provance was then assigned duties as a helper in the unit's NBC (Nuclear, Biological, and Chemical) room. There, when left alone, he would be personally responsible for hundreds of thousands of dollars worth of sensitive accountable items and equipment designed to protect soldiers from chemical attacks in battle. (This is not usually where unreliable soldiers should be stationed for daily duties.)

Then on July 23, Sgt. Provance's name appeared in the press again (following an interview months earlier) in a journalistic account of what may be the biggest story of the Iraq war, the torture of Iraqi children.

Report Mainz, a German television station, exposed accusations from the International Red Cross against the United States to the effect that over 100 children are imprisoned in U.S.-controlled detention centers, including Abu Ghraib. "Between January and May of this year, we've registered 107 children, during 19 visits in 6 different detention locations," Red Cross representative Florian Westphal said in the report.

The Red Cross report also delineated eyewitness testimony of the abuse of these children. Provance, who was stationed at Abu Ghraib, told the media that interrogating officers had gotten their hands on a 15- or 16-year-old girl. Military police apparently only stopped the interrogation when the girl was half undressed. A separate incident described a 16-year-old being soaked with water, driven through the cold, smeared with mud, and then presented before his weeping father, who was also a prisoner.

After these came to light, Army CID then went back to work on Provance with a whole new list of questions to be answered such as: "How was the interview with ABC News conducted?" "Did you call them or did they call you?" "How soon after your questioning [by Maj. Gen. Fay] was the interview with the press done?" and "Why did you feel as if the [Taguba] 15-6 was focused more on the MPs instead of MI?"

The summer months went by with the 205thMI Brigade nervously awaiting the results of the Fay report. For almost five months, the much-anticipated report has been thought to be a whitewash of accusations against senior MI

officers that have been redirected at lower-ranking soldiers. During this time, political forces in Washington were gathering, and they wanted answers.

On Aug. 13, Sgt. Provance was present at his unit's morning formation. Upon this occasion, his first sergeant, 1st Sgt. William Palenik, seized the opportunity to issue stern warnings to soldiers about talking to the press in light of the anticipated release of the Fay report.

Palenik went on to advise the soldiers that Army Public Affairs would be coming to brief soldiers on how they should handle themselves in the eventuality that they may be queried by the press.

Palenik then seized the opportunity to publicly and insultingly paint an analogy of a soldier at Abu Ghraib whose "only duty is to turn screws, and that such a soldier should only, 'talk about screws,'" while indirectly referring to Provance in front of his contemporaries. During the duty day of Aug. 13, numerous other soldiers asked Provance about his "screwing responsibilities."

In view of a command climate rife with liars, self-aggrandizing and self-preserving leaders, Palenik's actions and his smart mouth are censurable at a minimum.

On Aug. 19, Provance was informed by his platoon sergeant that he would become the noncommissioned officer in charge of his unit's orderly room. Provance expressed great concern to me and his attorneys at this sudden change of duty positions.

Notwithstanding, during this entire period of time, Provance had come to the attention of many people through the media and his stalwart effort to tell the truth. Largely reliant on the coordination effected by civilian attorney Hardy Vieux, the Senate Armed Services Committee requested Sgt. Provance's appearance before the panel on Sept. 1.

A letter from Sen. Kennedy asked Sgt. Provance to be in Washington, D.C., between Sept. 3-17 in order to be available for interviews by Kennedy, his staff, and possibly other members of the Senate and their staffs. The hearings at which Sgt. Provance is requested to testify begin on Thursday, Sept. 9. The lawmakers want the straight truth from Sgt. Provance, no matter who his testimony points to. That is how the system is supposed to work. Provance was scheduled to fly to Washington last week but his chain of command refused to allow him to depart Germany. At this point, it is unknown how high up the chain of command the no-fly order came from,

but as of Sunday night (Sept. 5), Provance was still in Germany. According to sources involved in the legal representation of Sgt. Provance, he was due to land at Dulles Airport at 4:00 PM, Monday, Sept. 6, 2004. It appears that despite the Army's best efforts to silence him, Sgt. Sam Provance will finally get to speak the truth, in a forum that the U.S. Army cannot ignore.

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'Definitely a Cover-Up'

Former Abu Ghraib Intel Staffer Says Army Concealed Involvement in Abuse Scandal

by Brian Ross and Alexandra Salomon

Dozens of soldiers other than the seven military police reservists who have been charged — were involved in the abuse at Iraq's Abu Ghraib prison, and there is an effort under way in the Army to hide it, a key witness in the investigation told ABCNEWS.

"There's definitely a cover-up," the witness, Sgt. Samuel Provance, said. "People are either telling themselves or being told to be quiet."

Provance, 30, was part of the 302nd Military Intelligence Battalion stationed at Abu Ghraib last September. He spoke to ABCNEWS despite orders from his commanders not to.

"What I was surprised at was the silence," said Provance. "The collective silence by so many people that had to be involved, that had to have seen something or heard something."

Provance, now stationed in Germany, ran the top secret computer network used by military intelligence at the prison.

He said that while he did not see the actual abuse take place, the interrogators with whom he worked freely admitted they directed the MPs' rough treatment of prisoners.

"Anything [the MPs] were to do legally or otherwise, they were to take those commands from the interrogators," he said.

Top military officials have claimed the abuse seen in the photos at Abu Ghraib was limited to a few MPs, but Provance says the sexual humiliation of prisoners began as a technique ordered by the interrogators from military intelligence.

"One interrogator told me about how commonly the detainees were stripped naked, and in some occasions, wearing women's underwear," Provance said. "If it's your job to strip people naked, yell at them, scream at them, humiliate them, it's not going to be too hard to move from that to another level."

According to Provance, some of the physical abuse that took place at Abu Ghraib included U.S. soldiers "striking [prisoners] on the neck area somewhere and the person being knocked out. Then [the soldier] would go to the next detainee, who would be very fearful and voicing their fear, and the MP would calm him down and say, 'We're not going to do that. It's OK. Everything's fine,' and then do the exact same thing to him."

Provance also described an incident when two drunken interrogators took a female Iraqi prisoner from her cell in the middle of the night and stripped her naked to the waist. The men were later restrained by another MP.

Pentagon Sanctions Investigation

Maj. Gen. George Fay, the Army's deputy chief of staff for intelligence, was assigned by the Pentagon to investigate the role of military intelligence in the abuse at the Iraq prison.

Fay started his probe on April 23, but Provance said when Fay interviewed him, the general seemed interested

Mr. KUCINICH. Thank you, Mr. Chairman.

As we learned from Sergeant Provance's testimony in panel one and numerous articles in the press, he was responsible for blowing the whistle on how military intelligence officers at Abu Ghraib directed military police to commit tortuous abuses as normal procedure for interrogating witnesses. After he revealed this to the press, he was demoted from sergeant to specialist and has gotten his security clearance revoked. Are you familiar with that?

Mr. GIMBLE. I am familiar with it, yes, sir.

Mr. KUCINICH. Has your office been involved in looking at the retaliations against Sergeant Provance?

Mr. GIMBLE. As Ms. Deese just reported, the attorney contacted us about a year and a half ago. There has never been a formal complaint filed with our office. It stayed within the Department of the Army, and I believe they still have an active review ongoing.

Mr. KUCINICH. So in other words, unless you get a formal request from somebody, you don't really look at it even if it is all over the pages of the newspaper?

Mr. GIMBLE. We normally get formal requests or have some additional information, our hotline gets contacted and——

Mr. KUCINICH. Do you ever initiate investigations on your own?

Mr. GIMBLE. Sure. We didn't in this case, though. Because we thought it was being investigated. But we have not——

Mr. KUCINICH. Well, could you give this subcommittee a more defined answer? We just heard an extensive discussion here, all kinds of things in the record. I mean, I read the background report that Specialist Provance entered as part of this record. Have you read that background report?

Mr. GIMBLE. Yes, sir.

Mr. KUCINICH. OK, now, if you have read that background report that is now part of an official hearing in the Congress of the United States, isn't that sufficient information for you, of your own initiative, to basically take the next step and ask for an inquiry?

Mr. GIMBLE. We can start an inquiry, absolutely. And we will take that back and have a look at it. We will look at the fact and see if it warrants additional investigation. I can't sit and tell you exactly what has been investigated, because they approached us a year and a half ago and didn't come back to us, and it seemed that they were working their own issue.

Mr. KUCINICH. I yield to the chair for——

Mr. SHAYS. I would just be curious to know what the law would enable you to do. If he didn't follow the proper procedure, then would you have to find against him, if he didn't follow the procedure that the law requires?

Mr. GIMBLE. What we would look at is we could look at the allegation. If we thought there was merit in the allegation, we of our own volition can start an investigation. We have the authority to look at any programs within the Department of Defense across the Defense intelligence agencies, the——

Mr. SHAYS. No. This is the question I am asking. The question I am asking is, you can initiate an investigation——

Mr. GIMBLE. Correct.

Mr. SHAYS. But are you restricted by the law to conclude that if he didn't follow the process as prescribed by law, that it was a fair demotion?

Mr. GIMBLE. We can initiate an investigation into any action that we determine is appropriate for us to do.

Mr. SHAYS. That part I am clear on.

Mr. GIMBLE. OK. There is no restriction that says we can't do that.

Mr. SHAYS. No, but that is not the question I am asking. Once you have initiated it and you have begun the investigation, there are rules which you then have to follow. There are rules which he has to follow. If he did not abide by those rules, even if in some ways he was justified, would you be able to find in favor of him or would the military simply say he went to the press, he didn't go to us, he got demoted because he went to the press and didn't come to us?

Mr. GIMBLE. We would look at the facts of the case and will not be constrained by any rules other than to come out with the logical conclusion based on the facts of our inquiry or investigation or audit.

Mr. SHAYS. OK.

Mr. GIMBLE. We do this routinely. We get 18,000 contacts on our hotline a year, which result in some 2,400 referrals.

Mr. SHAYS. Mr. Gimble, we are like two ships passing in the night. Because what I am asking is not whether you can investigate. I am clear you can investigate. And I——

Mr. GIMBLE. And I can come to the conclusion that we recommend the corrective actions that are deemed necessary based on our findings. And the fact he did not register as a whistleblower, we may not treat him as a whistleblower. We treat that as an allegation of reprisal.

Mr. SHAYS. But what happens if the decision was made that he simply went to the press instead of following what the law requires, that he go up the chain of command and, because he didn't go by the chain of command, in my own mind the military would come back and say he didn't follow the chain of command.

Mr. GIMBLE. I understood him to say he went with the chain of command, is what—he was protected—he went up the chain of command, he just didn't come all the way up to us and file a formal complaint with us.

Mr. SHAYS. Right.

I thank the gentleman for yielding.

Thank you.

Mr. KUCINICH. So I just want to go back to something, a propos of the chairman talking about ships passing in the night, is we make sure we make a connection. We have heard the testimony of Specialist Provance. He has taken an oath in front of a congressional committee. He has submitted documents under oath to this committee. Is that enough for you, of your own initiative, to open up an inquiry into this case?

Mr. GIMBLE. It absolutely is. We will go back and look at the facts as we see them and probably open up a——

Mr. KUCINICH. Thank you.

Now, I want to go back to the question——

Mr. SHAYS. Just one more time, do you mind if I——

Mr. KUCINICH. Oh, Mr. Chairman, it——

Mr. SHAYS. I want to be clear on this. Aren't you restrained in the relief you can provide, or do you have total capability to provide any relief you want, the military be damned?

Mr. GIMBLE. What we would do is we would come up with a fact-finding and make a recommendation. We have a procedure. If the military disagrees with us, we elevate that up, and in fact it can be elevated all the way to the Secretary of Defense for the final mediation of it.

Mr. SHAYS. So you do not have the ability to determine that his rank be restored. You only have the ability to recommend.

Mr. GIMBLE. We have the ability to determine if he has been reprised against and recommend he be restored.

Mr. SHAYS. But still it ultimately is the decision of the Secretary?

Mr. GIMBLE. It would be an Army decision.

Mr. SHAYS. It would not be your decision?

Mr. GIMBLE. It would not be my—no.

Mr. SHAYS. Under any circumstance, you could not restore——

Mr. GIMBLE. Right.

Mr. SHAYS. You can only recommend?

Mr. GIMBLE. We can only recommend.

Mr. SHAYS. Do you mind just one more second?

Is that how it works with you, Mr. McVay?

Mr. MCVAY. Sir, we would have to seek action with the Merit Systems Protection Board to get that kind of relief. Most of our cases, however, if we find there has been a prohibited personnel practice or reprisal for whistleblowing, the agency, after we send a letter to the head of the agency, settles the case. But if in fact there is no agreement, we have to file with the Merit Systems Protection Board to——

Mr. SHAYS. And the Board makes a ruling?

Mr. MCVAY. Yes, sir.

Mr. SHAYS. But then their ruling stands?

Mr. MCVAY. That is correct, other than there is an appellate procedure.

Mr. SHAYS. Right. But there is no appellate procedure in the case of Justice or in the case—there is, Mr. Fine?

Mr. FINE. Yes. We would make a finding. If we found that there was retaliation, the agency could put the person back in the position they should have been or, if they contested it, go to the Office of Attorney in Recruitment and Management, where there is an appellate process, where they make a decision. And even that could be appealed to the Deputy Attorney General. That is within the agency, though.

Mr. SHAYS. Right. But in the end, is the Justice Department required to do what your findings are?

Mr. MCVAY. No. They are not.

Mr. SHAYS. They are not required.

Mr. MCVAY. We recommend. That is right, they are not——

Mr. SHAYS. And in the case of the Secretary of Defense, he is not required, and there is no meritorious board to make a final decision?

Mr. MCVAY. Correct. Outside the agency. That is correct.

Mr. SHAYS. With all respect to the sergeant—good luck. With all due respect.

Sorry. Thank you.

Mr. KUCINICH. Well, actually, Mr. Chairman, with all due respect to the Chair and this subcommittee and this whole process that we have spent the afternoon on, what are we here for? We are here to make sure that whatever the law permits, if there is relief to be provided to a whistleblower who has been unfairly retaliated against, that we start the process. So what I am humbly suggesting here—and Mr. Gimble has been kind enough to respond—that you start the process. And I believe that Secretary Rumsfeld, for example, if it was laid out for him that there was a case where a serviceman or servicewoman of the United States of America spoke their conscience and was unfairly retaliated against, I mean, I wouldn't see why the Secretary of Defense or any Cabinet person in the administration would——

Mr. SHAYS. That is the nicest thing that someone has said about Mr. Rumsfeld in this subcommittee in a long time. [Laughter.]

Mr. KUCINICH. Well, I mean, we don't always have to presume the worst about people. [Laughter.]

Mr. MEYER. Mr. Chairman, could I volunteer a comment about what we are making observations on?

Mr. SHAYS. Yes, Mr. Meyer.

Mr. MEYER. I am Dan Meyer. I am Director of the Civilian Reprisal Investigations at the Pentagon. I think it is important to bear in mind, though, that the reason why the process is complaint-driven is that sometimes whistleblowers don't want us to be the first entity that looks at a case. So for a civilian that comes to me, they may ultimately want to go to the Office of Special Counsel, which has primary jurisdiction. Or they may also have in their fact pattern maybe some discrimination issues that they want to file in the D.C. District Court. So if we adopt a uniform policy of going out and grabbing cases, we could end up actually doing things other than what the whistleblower wants to do.

Mr. KUCINICH. You know, Mr. Meyer, that is a good case. By the way, did you listen to Specialist Provance's testimony?

Mr. MEYER. Yes, I did, sir.

Mr. KUCINICH. Did you read the addendum to his testimony that he provided this subcommittee and swore to under oath?

Mr. MEYER. No, I did not get to read the addendum.

Mr. KUCINICH. OK. Based on what you heard, is it your belief that Specialist Provance would somehow be opposed to Mr. Gimble proceeding to look at the allegations of retaliation for whistleblowing? Is this such a case as you are speaking of?

Mr. MEYER. Sir, I would still be more comfortable if the whistleblower took the proactive action of asking for the complaint to be filed. I will give you an example with Bunnatine Greenhouse. When I saw——

Mr. KUCINICH. No, you can give me your case, but we have a case that has been in front of us here all afternoon. So you still have some resistance to this. That is interesting. It is very instructive.

Go back to Mr. Gimble—thank you. I have some more questions here, if I may. Thank you. You know, I know where you are coming from, very clearly.

Now, I heard Mr. Tice say something earlier and I want to make sure that I understand totally what the response to his assertion is. With respect to the leak to the New York Times, was that investigation conducted by the NSA—one by the NSA and one by the DOD, or were both IG investigations conducted by the NSA?

Mr. GIMBLE. I think there are two things. The leak investigation is being investigated by the FBI, as I understand it.

Mr. KUCINICH. Right. Excuse me. Right.

Mr. GIMBLE. The other part of this is the retaliation——

Mr. KUCINICH. That is what I meant, thank you. Retaliation.

Mr. GIMBLE. We were saying there are two investigations. Initially NSA IG investigated that. We kept an oversight case open on it. We were not completely happy with what the NSA IG did, so we went back and did some additional work and we concluded that. That report has been furnished.

But one point I would like to make that he brought up that I think is germane here is that when he said he wanted to execute the intelligence community Whistleblower Protection Act, he came to our office and testified that we were not cleared to receive that. I actually think that is incorrect. We are cleared to have that. We could receive that information, and he chose not to provide it, probably because he was uncomfortable with knowing that we were in fact cleared to that level. So I just wanted to clarify that.

Mr. KUCINICH. OK. Are you familiar, Mr. Gimble, with the case of Michael Nowacki?

Mr. GIMBLE. No, sir, I am not.

Mr. KUCINICH. Let me illuminate you as to it. According to the Sante Fe Reporter, Michael Nowacki was a National Guardsman who spent his tour in Iraq as a military intelligence officer interrogating more than 700 detainees. More often than not, he felt that seemingly innocent Iraqi civilians, such as, for example, a retarded man who was accused of high-level intelligence activities, were not released despite his recommendation they be released. He said that up to 90 percent of the people brought to his brigade internment facility near Baghdad were innocent and the over-zealous arrests were based on unspoken Army quotas.

After returning from his tour in Iraq, he wrote to his superiors expressing concern. In response, he was put under investigation and given little information about the investigation. As a result, even though his contact with the Army ended on November 1, 2005, he was not released until just last month, January 11th. His security clearance has been suspended, which has precluded him from getting several jobs for which he is qualified. The Army has held his reenlistment bonus because he has a "negative personnel flag" in his file. He was questioned and harassed, accused of stealing military equipment.

You haven't heard anything about it?

Is there anybody here that knows anything about it?

Mr. DEESE. I am not familiar with that, but we could certainly check.

Mr. KUCINICH. I am going to make sure my staff forwards all that information to you and you can check it out. As you pointed out, Mr. Gimble, you don't have to wait to be contacted by a whistleblower—I mean, if a Member of Congress brought something to your attention.

Mr. GIMBLE. Absolutely.

Mr. KUCINICH. Would that be of interest?

Mr. GIMBLE. Yes, sir.

Mr. KUCINICH. Well, that is good.

Well, I think that is fine. Thanks, Mr. Chairman. Thank you.

Mr. SHAYS. Just one last question to you, Mr. Fine. Both counsel and I were puzzled by your comment about the case with Mr. German in regard to the fact that you basically found his complaint meritorious except as it related to terrorism. I don't know why you threw that in. What is the significance of that?

Mr. FINE. The significance of that was that was one of his main concerns, that the FBI had missed a viable terrorism case. And he raised that repeated with us and he raised that in his comments with us, and I think that was a significant concern that he had. And therefore we looked at it and that was a significant part of our investigation, so I wanted to let the committee know that.

Mr. SHAYS. Let me just let counsel——

Mr. HALLORAN. What impact does that have on the significance of other findings that you made in terms of—you are not saying it justifies illegally recording or trying to make that recording go away?

Mr. FINE. Absolutely not. Absolutely not. I was trying to give you the scope of what our investigation was.

Mr. SHAYS. Thank you. That is helpful.

Is there any comment that any of you would like to make before we adjourn this panel?

[No response.]

Mr. SHAYS. The next time we ask if you can go third—going to argue profusely that not happen. But I think it was important to have it happen this way. We would have had you testify in theory and then we would have had others testify after. So I think, in the end—and I will also point out that you didn't have to answer questions from a lot of Members by coming third. [Laughter.]

So thank you all very much. This hearing is adjourned.

[Whereupon, at 5:54 p.m., the subcommittee was adjourned.]

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